petition

Supreme Court, U.S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1273

NATIONAL JEWISH HOSPITAL AND RESEARCH CENTER,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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CITATIONS TO OPINIONS BELOW

The Decision and Order of the Administrative Law Judge for the National Labor Relations Board is reported at 226 N. L. R. B. No. 198, 94 L. R. R. M. 1110 (1976), and is printed in Appendix A, *infra*, page App. 1. The first Opinion of the Court of Appeals printed in Appendix B, *infra*, page App. 40 is unreported to this date. The final Judgment and Opinion of the Court of

Appeals printed in Appendix C, *infra,* page App. 47, is also unreported to this date.

JURISDICTION

The judgment of the Court of Appeals was entered November 28, 1978. The original opinion of the Court of Appeals was entered July 28, 1978 (Appendix A, *infra*). Petition for Rehearing was filed August 25, 1978. The Court of Appeals entered an Order November 2, 1978, withdrawing its opinion as entered July 28, entering a new opinion, and denying the Petition for Rehearing en banc. This opinion is set forth in Appendix C, *infra.* The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED

1. Did the Tenth Circuit Court of Appeals misconstrue *Beth Israel Hospital v. N. L. R. B.,* 98 S. Ct. 2463 (1978), as establishing a burden upon a hospital employer to produce positive evidence, showing actual cases of injury to patients' health as a result of past solicitation activities, before it can prohibit solicitation, in spite of a reasonable probability of disruption of services or harm to patients?

2. Did the Tenth Circuit Court of Appeals misinterpret *Beth Israel* to mandate application of the presumption in favor of the right to solicit in a hospital cafeteria where over ninety percent of the patients receive their meals and where the patients are suffering from acute asthma—an infirmity particularly sensitive to aggravation by emotional tension or unrest?

STATEMENT OF THE CASE

National Jewish Hospital (the Hospital) operates a 250 bed medical center in Denver, Colorado. The Hospital provides medical care primarily to asthmatic patients and some treatment of cystic fibrosis patients and patients with "other allergic and immunological difficulties such as severe eczema." (Transcript pp. 60, 127). The population census of the Hospital's patients is normally 50 percent adults and 50 percent minors (Transcript pp. 60, 127, 134). The patients are generally known as "treatment failures" who come to the Hospital from all parts of the country. A "treatment failure" is a patient who is unable to manage his or her asthma on an outpatient basis (Transcript pp. 64, 65).

The uncontroverted evidence before the Court proved the Hospital is unique and unlike a general hospital. The average length of stay of patients is nine months or longer, whereas the average length of stay in a general hospital for an asthmatic patient is three to six days (Transcript p. 59). Dr. Sadler, a staff physician, psychiatrist and Coordinator of the Pediatric Behavorial Sciences Liaison Services for National Jewish, testified that the Hospital is a unique medical care institution as opposed to general hospitals in that:

> Our hospital has a large psychiatric and behavorial sciences and child care staff where we are cognizant of the total comprehensive management of these patients where they come in for a total treatment that's individualized for a lengthy period of time.

(Transcript p. 60). The therapeutic treatment program in which the staff works to control the total patient environment from the time he enters the Hospital is unique in the United States (Transcript p. 73).

The evidence shows that the primary factor in the total therapeutic treatment program is the elimination of situations which may cause stress and anxiety for the patients (Transcript pp. 64, 67, 68, 75). In uncontroverted testimony, Dr. Sadler stated:

> Asthma is considered a psychophysiologic disorder. It means it has both an organic biological medical basis, but very key factors in the treatment of asthma are emotional factors, either stress, effects of anxiety, anger, tension, can affect the way an asthmatic functions; and how he copes with those emotions can be a determining factor in how well he manages his asthma.

(Transcript p. 63). Stress factors are significantly more important at the National Jewish institution than at a general hospital because, as Dr. Sadler testified, ". . . the psychological factors in asthma are so inextricably interwoven with our group of patients." (Transcript p. 68). Dr. Sadler further testified as to examples of stress, anxieties, and other factors which may initiate a patient asthma attack, including exposure to an argument or loud confrontation (Transcript pp. 64, 67, 68, 69).

Further uncontroverted testimony evidenced the unique fact that ninety percent of the Hospital's patients

are ambulatory (Transcript p. 61). The patients are involved in various areas of the Hospital, such as in school, in specific treatment areas on the grounds, in the cafeteria, and other places in the Hospital as part of their daily program (Transcript pp. 61, 65). They receive in those areas what is considered at National Jewish Hospital to be direct patient care. Again, this is in distinct contrast with a general hospital where most patients are confined to their rooms and for the most part are not considered ambulatory.

With respect to the Hospital cafeteria, the uncontroverted testimony revealed that over ninety percent of the patients take their meals in the cafeteria as opposed to eating in their rooms, again, in sharp contrast to general hospital practices (Transcript p. 130). Patients with I.V.s (intravenous fluids) running, and patients on oxygen are included in those who frequent the cafeteria (Transcript p. 66).

The cafeteria was described as having two serving lines, one on each side of the cafeteria. Only one line is open for serving of food for the breakfast and evening meal. At the noon meal both lines are open for serving—one line with a cash register for those who must pay for the meal directly and one line without a cash register for patients. The cafeteria is sometimes separated by the extension of a movable partition. One corner of the cafeteria is reluctantly set aside for smoking (Transcript pp. 128-130, 137-139).

There is some controversy as to which side of the cafeteria the patients frequented and how often the partition in the middle of the cafeteria was open. Mr. Blake

testified there was an employees' side of the dining area, but it was not marked as such (Transcript pp. 10, 19). Mr. Blake did not testify whether or not the partition was ever open. Mr. Blake further testified that he spent the majority of his employment on the evening shift, and that he ate a majority of his meals not in the cafeteria but in the employees' lounge (Transcript p. 28). He also testified that he had never eaten breakfast in the cafeteria (Transcript p. 29).

On the other hand, the Hospital's uncontroverted evidence produced from both the hospital administrator, who ate in the cafeteria an average of twice a day, five days a week, and Dr. Sadler, who ate in the cafeteria two or three times a week demonstrated that the partition is generally extended 50 to 70 percent of the time at the noon meal and generally not extended at the evening meal or at breakfast (Transcript pp. 71, 135, 136). Patients can and do go into both areas of the cafeteria and are interspersed with the employees (Transcript pp. 63, 136).

The hospital administrator also testified that there are identified areas in the hospital where patients are either not allowed or not apt to be. These areas are four employee lounges near the nursing stations and two central employees' lounge/locker rooms (one for females and one for males) (Transcript pp. 140, 141, 142). These areas are used for coffee breaks, lunch breaks, smoke breaks, etc. (Transcript pp. 140, 146).

The Hospital had a long-standing policy which, though the exact wording changed at times, prohibited solicitation except in the employee only areas. Thus, solicitation in the cafeteria was prohibited.

This case arose out of the Hospital's termination of Mr. Richard Blake from his employment for inconsiderate and inappropriate treatment of a patient (Transcript pp. 89-94). The termination notice given to Mr. Blake contained, in addition to the reason for termination, the usual listing of previous violations. Since the list noted warnings for violation of the Hospital's solicitation policy, Mr. Blake and the Service Employees International Union, Local 105, filed an unfair labor practice charge against the Hospital, asserting that Blake's discharge was motivated by his violation of an illegal solicitation rule.

Administrative Law Judge, Earldean V. S. Robbins, ruled that promulgation and enforcement of the Hospital's rule, which prohibited solicitation in its cafeteria, constituted an unfair labor practice, in violation of Section 8 (a) (1) and 8 (a) (3) of the National Labor Relations Act. The National Labor Relations Board adopted her opinion and order (Appendix C). The order was appealed to the Tenth Circuit Court of Appeals and that court initially held that the recently decided case of *Beth Israel Hospital v. N. L. R. B.*, 98 S. Ct. 2463 (1978), required total rejection of the Tenth Circuit's previous position in *St. John's Hospital and School of Nursing v. N. L. R. B.*, 557 F. 2d 1368 (10th Cir. 1977), and therefore, affirmed the Board's ruling. After National Jewish petitioned the court for rehearing, the Court of Appeals withdrew its initial opinion, issued a new opinion, with Judge Stanley dissenting, and denied a petition for rehearing on the revised opinion.

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REASONS FOR GRANTING THE WRIT

I. The Court of Appeals erred in holding that, "*Beth Israel* made it plain that the burden was on the employer to bring forward positive evidence showing that solicitation activities had a disrupting effect upon patients' health." (Appendix B at p. App. 40).

The Court of Appeals based its decision in this case solely on this Court's recent decision in *Beth Israel.* The Tenth Circuit stated ". . . that we consider . . . that it [*Beth Israel*] is not only applicable but controlling; that it comes to grips with our problem and resolves it." (Appendix B at p. App. 40). In that light, any misconception or misapplication of the *Beth Israel* decision not only is fatal to the result in this case but also sets a dangerous precedent in a very volatile area of labor relations law.

During the previous two year period, five of the United States Courts of Appeals had grappled with the issues surrounding union solicitation in hospitals. See, e. g., *N. L. R. B. v. Beth Israel Hospital,* 554 F. 2d 477 (1st Cir. 1977); *St. John's Hospital v. N. L. R. B.,* 557 F. 2d 1368 (10th Cir. 1977); *Lutheran Hospital v. N. L. R. B.,* 564 F. 2d 208 (7th Cir. 1977); *N. L. R. B. v. Baptist Hospital, Inc.,* 576 F. 2d 107 (6th Cir. 1978); and *Baylor University Medical Center v. N. L. R. B.,* 578 F. 2d 351 (D. C. Cir. 1978).

The Supreme Court granted certiorari to the First Circuit and decided the *Beth Israel* case because of conflicting decisions by the Courts of Appeals. It also granted certiorari in the *Lutheran* and *Baylor* cases and

remanded them for reconsideration in light of its decision in *Beth Israel.* Certiorari has also been granted in the *Baptist* case, and hearing is pending. At present, however, *Beth Israel* clearly stands as the controlling case on this particular issue of labor law. As such, its holding and rationale must be clarified and fortified against misconception or misapplication.

The most serious impact of the Tenth Circuit Court of Appeals' decision in *National Jewish* results from its reading of *Beth Israel* as establishing a burden upon the employer "to bring forth *positive evidence* showing that solicitation activities *had* a disrupting effect upon patients' health." (Appendix B at p. App. 40) (emphasis added). The Court of Appeals clarified its reading of *Beth Israel* as requiring the hospital "to establish that patient care *was affected* by solicitation and that *actual patient disruption resulted* from it. The mere possibility, however, of disturbance was held to be insufficient to justify promulgation of a regulation imposing unrelated restrictions." (Appendix B at p. App. 40) (emphasis added).

The burden established by the Court of Appeals and attributed to *Beth Israel* would require National Jewish Hospital to permit solicitation until it could collect enough incidents to bring forth *"positive evidence"* that solicitation had actually caused injury to patients' health. It is Appellant's position that *Beth Israel* established no such burden, and that the Court of Appeals erred in applying a standard which requires actual injury to patients' health.

In *Beth Israel,* the Supreme Court analyzed the 1974 health care amendments which extended coverage of the National Labor Relations Act to nonprofit hospitals:

> [W]e cannot say it [Congress] necessarily regarded appropriately regulated solicitation and distribution in areas such as the cafeteria as undesirable without *evidence* of a substantial *threat* of harm to patients. . . . [W]e therefore cannot say that the Board's policy—which requires that absent such a showing solicitation and distribution be permitted in the hospital *except in areas where patient care is likely to be disrupted*—is an impermissible construction of the Act's policies as applied to the health-care industry by the 1974 amendments.

98 S. Ct. at 2473 (emphasis added). In explaining the result in *Beth Israel,* the Court noted: "Especially telling is the fact that petitioner . . . was unable to introduce *any* evidence to show that solicitation or distribution was *or would be* harmful." 98 S. Ct. at 2474. ("any" emphasized in original; other emphasis added).

While *Beth Israel* may mandate application of a presumption favoring solicitation in hospital cafeterias, it clearly does not require positive evidence of actual past injury to patients' health to overcome the presumption. Rather, evidence of a substantial threat of harm to patients or even a likelihood of disruption of patient care is all *Beth Israel* requires to overcome the presumption. In *Beth Israel,* there was a dearth of harm, actual or threatened; hence, it was unnecessary to fully explore issues which might be raised in "a more usual hospital case" and which are certainly raised by this case, which is at the opposite end of the patient-cafeteria-use spectrum.

This analysis is supported by the recent action taken in the *Baylor* case. In *Baylor,* the Court of Appeals for the District of Columbia refused to enforce an order of the N. L. R. B. which found the hospital's prohibition against solicitation in the corridors or cafeteria to constitute an unfair labor practice. This Court granted certiorari on the cafeteria issue and remanded the case for reconsideration in light of *Beth Israel* on that issue alone. The petition for certiorari was denied insofar as it sought review of the corridor issue.

The D. C. Circuit, in *Baylor,* upheld the hospital's ban on solicitation in the corridors. The Court's holding that the no-solicitation rule was justified was based upon evidence which established a "likelihood that congestion and commotion would result from solicitation. . . . " 578 F. 2d at 356. Other phrases used by the Court to characterize the evidence relating to the effects of solicitation included: ". . . possible sources of disruption. . . ." Id. at 354; " . . sources of potential disruption . . . " Id. at 355; and ". . . potential recurrent cause of disruption in the corridors" Id. at 356. The hospital's burden was met by evidence of potential disruption, rather than actual injury to patients.

It is recognized that this Court's denial of the petition for certiorari does not affirm the *Baylor* holding on the corridor issue. It does, however, leave as the controlling law in the District of Columbia Circuit a burden of proof which is very different than the one established by the Tenth Circuit in this case. It is critically important to the management of hospitals throughout the nation to know whether: (1) A hospital may justify no-solicitation rules by producing evidence

of a likelihood of disruption or threat of harm to patients' health; or (2) A hospital may only justify such rules by showing positive evidence of actual previous disrupting effect on patients' health.

The D.C. Circuit in *Baylor* and, the Hospital believes, this Court in *Beth Israel,* support the first proposition. The Tenth Circuit in this case has erroneously established the second proposition. Thus, there is a serious conflict with respect to the burden of proof which a hospital must bear to overcome the presumption against the validity of no-solicitation rules.

II. The *Republic Aviation* presumption, *(see, Republic Aviation Corp. v. N.L.R.B.,* 324 U.S. 793) as applied in *Beth Israel,* in favor of the right to solicit, is clearly overcome by a showing that over ninety percent of the patients receive their meals in the hospital cafeteria and the majority of those patients are suffering from acute asthma—an infirmity particularly sensitive to tension or unrest. In applying the presumption to National Jewish Hospital, the Tenth Circuit Court of Appeals has misconceived and misapplied the holding of *Beth Israel.*

More fundamental than the Court of Appeals' misapplication of the *Republic Aviation* presumption is the issue of whether that presumption should have been applied at all. In its most recent pronouncement on hospital labor matters, this Court characterized its *Beth Israel* decision as follows: "In *Beth Israel Hospital v. N.L.R.B.,* (citations omitted) the Court concluded that the *Republic Aviation* presumption did apply to a hospital cafeteria maintained and operated primarily for

employees and rarely used by patients or their families." *N.L.R.B. v. Baylor University Medical Center,* 99 S.Ct. 299 (1978).

In the case at bar, the Court of Appeals assumed that if the presumption applied to the Beth Israel cafeteria it must also apply to the National Jewish cafeteria. However, as noted in Judge Stanley's dissent, "the record in *Beth Israel* differs in each material area from the record before the Board in the case at bar." (Appendix C, p. App. 47). A comparison of these material areas supports Judge Stanley's conclusion.

Nature of the Hospital—Beth Israel, like most general acute-care hospitals, focuses on specific treatment of physical disorders of patients who are usually confined to their beds for a matter of days. In contrast, National Jewish primarily treats asthmatics who have been "treatment failures," i.e., unable to cope with their asthma on an out-patient basis. National Jewish patients may remain in the hospital six to nine months or longer. Since asthma is a psychophysiological disorder complicated by emotional factors, a central focus of treatment is the elimination of stress, anxiety and tension throughout the entire "therapeutic milieu." (Dr. Sadler's testimony, Transcript pp. 63-68.)

Use of the Cafeteria—In Beth Israel Hospital, a patient was allowed to visit the cafeteria only when his doctor certified that he was well enough to do so, and the Supreme Court deemed it "of critical significance that only 1.56 percent of the cafeteria patrons are patients." Justice Powell, in his concurring opinion noted that "the undisputed evidence portrays this cafeteria as

being one essentially operated for employees as their primary gathering place, and as almost wholly unrelated to patient care." 98 S. Ct. at 2482. In National Jewish over ninety percent of the patients, including some receiving intravenous fluids and oxygen treatment, regularly receive their meals in the cafeteria. Children are actually assisted and supervised by hospital staff while they are in the cafeteria. (Transcript pp. 62 and 65.)

Effect of Solicitation—In *Beth Israel* the hospital "was unable to introduce *any* evidence to show that solicitation or distribution (in the cafeteria) was or would be harmful." 98 S. Ct. at 2474. In *National Jewish* there was uncontroverted testimony by Dr. Sadler that a loud argument or confrontation between two people with raised voices definitely could set off a patient's asthmatic attack. (Transcript p. 64.)

Solicitation Access—In *Beth Israel* the Supreme Court held that consideration of the availability of alternate space where union activities were permitted was inapposite "where the only areas in which organizational rights are permitted is not conducive to their exercise." Less than one-third of 2200 regular Beth Israel employees had access to any of the areas (six separate and scattered locker rooms containing only 613 lockers) in which union solicitation was permitted. In National Jewish all of the employees have access to four lounges and two locker rooms where solicitation is permitted.

In spite of the total disparity of facts, the Tenth Circuit Court of Appeals seemed to blindly follow the *Beth Israel* result, thus confirming the fear expressed by Justice Blackmun's concurring opinion:

> The tenor of the Court's opinion and of the Board's approach concerns me. There are many hospital coffeeshops and cafeterias that are primarily patient and patient-relative oriented, despite the presence of employee-patrons, far more so than this very restricted Beth Israel operation, that seems akin to a manufacturing plant's employees' cafeteria. I fear that this unusual case will be deemed to be an example for all hospital eating-facility cases, and that the Board and the courts now will go further down the open-solicitation road than they would have done, had a more usual hospital case been the one first to come here.

98 S. Ct. at 2477-2478. With respect to cafeteria use, National Jewish Hospital is perhaps no more usual than Beth Israel Hospital. Indeed, with over ninety percent of its patients receiving their meals in the cafeteria, it is at the opposite end of the spectrum. On the basis of that fact and the fact that National Jewish Hospital's patients are suffering from an infirmity which is particularly sensitive to tension and unrest, the application of the *Republic Aviation* presumption in favor of allowing solicitation in the cafeteria is surely inappropriate. This Court has suggested that the presumption does not have absolute application to all hospital cafeterias. If there is any case in which the presumption does not apply, *National Jewish* is the case. To allow the Court of Appeals' ruling to stand unreviewed would be to approve of blanket application of the presumption, regardless of circumstances.

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CONCLUSION

The granting of certiorari in the *Baptist Hospital* case suggests that the Supreme Court is still attempting to clarify the law concerning union solicitation in the hospital setting. If this Court should affirm that decision, this case would clearly be at odds with its opinion. However, even if *Baptist Hospital* should be reversed, the Tenth Circuit's decision in *National Jewish* would still warrant review. The Tenth Circuit Court of Appeals' holding in *National Jewish* as to burden of proof and its application of the *Republic Aviation* presumption to the unique facts of the case are both in conflict with the apparent tenor of this Court's previous decisions and the law in other circuits. Review of the case by this Court is imperative in order to establish certainty in a volatile area of labor law which directly impacts upon the quality of health care in the Nation.

FOR THE FOREGOING REASONS, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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APPENDIX A

FPW
D—1822
Denver, Colo.

226 NLRB No. 198

UNITED STATES OF AMERICA

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 27—CA—4793 and
27—CA—4851

NATIONAL JEWISH HOSPITAL AND
RESEARCH CENTER
and
SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 105

DECISION AND ORDER

On June 23, 1976, Administrative Law Judge Earldean V. S. Robbins issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in opposition to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and

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1 We do, however, find merit in Respondent's exception to the Administrative Law Judge's finding that the normal

(Continued on next page)

conclusions of the Administrative Law Judge and to adopt her recommended Order.

D—1822

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, National Jewish Hospital and Research Center, Denver, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

Dated, Washington, D. C. December 1, 1976

.....

John H. Fanning, Member

(Continued from previous page)

patient population in the hospital is 50 adults and 50 children. According to the uncontroverted testimony of Hospital Administrator Quarton, the patient poulation is 50 *percent* adults and 50 *percent* children.

We also find merit in Respondent's exception to the Administrative Law Judge's finding that Hurias' surveillance of Blake took place on January 7, 1976, the same day that Blake solicited cards in the hospital cafeteria. According to Blake's uncontroverted testimony, Hurias followed him around in the cafeteria the day after he solicited the cards; namely, January 8. The Administrative Law Judge's Conclusion of Law Number 6 is hereby modified accordingly. We also note that when summarizing this incident in the penultimate paragraph of Sec. III, A, 2, of her Decision, the Administrative Law Judge inadvertently refers to December 15 as the date Hurias followed Blake around the cafeteria. The date of January 8 should be substituted therefor.

Finally, in sec. II, B, 1, of the Administrative Law Judge's Decision, in the first line of the seventh paragraph, delete "Meyer" and substitute "Sharlin."

.....

John A. Penello, Member

.....

Peter D. Walther, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

JD-(SF)-143-76
Denver, Colo.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

Case Nos. 27-CA-4793
27-CA-4851

NATIONAL JEWISH HOSPITAL AND
RESEARCH CENTER
and
SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 105

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HENRY C. CLEVELAND, III, ESQ.,
of SAUNDERS, SNYDER, ROSS &
DICKSON, of Denver, Colo.,
for the Respondent.

DECISION

Statement of the Case

EARLDEAN V. S. ROBBINS, Administrative Law Judge: This case was tried before me on May 11, 1976 in Denver, Colorado. The charges in Case No. 27-CA-4793 and in Case No. 27-CA-4851 were filed by Service Employees International Union, Local 105, herein called the Union, and served on Respondent on January 15, 1976 and March 9, 1976 respectively. The consolidated complaint, which issued on April 20, 1976,[1] alleges that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act.

The issues herein are whether Respondent promulgated an illegal no-solicitation and no-distribution rule; and disparately applied and enforced illegal no-solicitation rules; whether Respondent engaged in unlawful surveillance of employees' protected activity; and whether Respondent discharged Richard Blake because of his activities on behalf of the Union.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the post-trial briefs filed by the parties, I make the following:

Findings of Fact

I. Jurisdiction

Respondent, a Colorado corporation, operates a hospital in Denver, Colorado, where it is engaged in the

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1 The original complaint in Case No. 27-CA-4793 issued on February 11, 1976.

providing of medical and health care services. Respondent, in the course and conduct of its business operations, annually has gross revenues of a least $250,000 and annually purchases and receives goods and materials valued in excess of $50,000 directly from sources outside the State of Colorado.

The complaint alleges, the answer admits, and I find that Respondent is, and at all times material herein has been, an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2),(6) and (7) of the Act.

II. Labor Organization

The complaint alleges, Respondent admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *The Alleged Section 8(a)(1) Violations*

I. Facts

At all times material herein prior to December 15, 1975, the Respondent maintained a no-solicitation rule set forth in its employee handbook which provides:

No Solicitors

> Solicitations, collections and petitions for outside agencies are permitted only on approval of the administrator.

Richard Blake, employed by Respondent as an inhalation therapist since April 27, 1975, began organiz-

ing for the Union in around November 1975.[2] His principal activity in this regard was obtaining signatures on union authorization cards from fellow employees. On December 10, just before his shift was to start, Blake approached employee William Turner[3] near the elevators in the lobby of the Goodman Building on Respondent's premises. Blake asked Turner if he had some time. After Turner answered affirmatively, Blake began talking to him about signing a union authorization card. Turner suggested that Blake accompany him onto the elevator, which he did. In the elevator, Blake gave Turner an authorization card. Turner said he wanted to take the card and think about it.[4]

On December 15, 1975 when Blake reported for work, Phyllis Wilson, his immediate superior and an admitted supervisor, approached him in the inhalation therapy room of the Goodman Building. According to Blake's undenied testimony, Wilson said they had to go to personnel. Blake asked if it concerned the Union. Wilson said yes. Blake asked if he was being discharged and Wilson said he would be given a warning letter. Blake requested a witness so Greg Wallace, an inhalation therapist, accompanied them.

They proceeded to the office of Robert MacDevitt, personnel director and an admitted supervisor. According to Blake, MacDevitt said he was sorry they could not have met

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2 Unless otherwise stated, all dates herein in November and December are in 1975 and those in January, February and March are in 1976.

3 Turner is employed by Respondent as an orderly.

4 This is from the undenied testimony of Blake, whom I credit in this regard. Turner did not testify.

under more pleasant circumstances and he was wondering why Blake had not approached Wilson or him about his problems instead of seeking outside help. MacDevitt said he was goinng to give Blake a warning notice for soliciting during working time. Blake said it was before his shift started and that he had asked Turner if he had some time. MacDevitt said this did not constitute a break.

MacDevitt testified that Blake had been reported for soliciting Turner while Turner was working. According to MacDevitt, he asked Blake if he was aware that Respondent had a no-solicitation rule. Blake said no. MacDevitt asked if Blake ever received a copy of the employee's handbook. Blake said he had. MacDevitt said there was a no-solicitation rule in the handbook, that basically he was concerned not so much that Blake was soliciting but that he approached an employee who was supposed to be working. He told Blake that such soliciting was against hospital policy and that he would have to approach an employee when the employee was not on working time, when he was on a break or was on his lunch hour and outside the hospital premises. MacDevitt asked if it were true that Turner was working. Blake said yes. MacDevitt said, "Well, in that case I have to give you a warning notice for soliciting an employee while that employee was working." MacDevitt asked Blake to sign the notice to indicate that he had read and understood it, which Blake did.

On December 17, Respondent posted a new no-solicitation rule which reads:

SOLICITATION BY EMPLOYEES

Because of the disruption to health care services of the hospital, no material shall be distributed to and

> no solicitation shall be made of, any hospital patient or employee in any public area within the hospital premises. Any solicitation must be confined to non-work and non-public areas and during non-working time.

On January 7, 1976, in the hospital cafeteria, Blake went to different tables and solicited various employees to sign union authorization cards.[5] Blake's undenied testimony[6] is that Dick Hurias, an admitted supervisor, followed him that day in the cafeteria. According to Blake, Hurias appeared to be watching him so he decided to check. He went over to the patient's side of the cafeteria. Hurias followed. He came back into the employees' side. Hurias was there, watched him go through the line, watched him sit at a table and eat and even followed Blake when he went for a drink of water. All this time Hurias was never much more than 10 feet from Blake.

Blake further testified that when he returned to the inhalation therapy room, Wilson said she'd gotten a call from administration when he was at lunch and they were very upset. Blake said his actions were legal and Wilson said it was just to tell him they were watching him. The next morning Wilson told Blake that she telephoned administration to see why they were so upset and MacDevitt told her they considered the cafeteria a public area and he was not allowed to solicit there. Wilson testified but neither denied these conversations nor gave her version

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5 The record does not indicate whether Blake actually distributed authorization cards.

6 Hurias did not testify. According to MacDevitt, Hurias has been transferred out of the Denver area.

of them. She did testifiy that some time after December 15, 1975, she told Blake that he was soliciting when he he should not be. Blake asked where he could solicit and Wilson told him in the lounges and in the locker room.

2. Conclusions

It is well established that no-solicitation rules are presumed valid if applicable only to solicitation during working time, but are presumed unlawful if they extend to solicitation during non-working time, whether in a work or non-work area. To rebut such presumption of illegality, an employer must show justification sufficient to warrant further curtailment of employee rights. *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615; *Republic Aviation Corp., v. N. L. R. B.*, 324 U. S. 793, 801-803. It is also well settled that no-solicitation rules that require employer approval for union solicitation are unlawful. *Dreis & Krump Manufacturing, Inc.*, 221 NLRB No. 46; *Graham Ford, Inc.*, 218 NLRB No. 151; *Crenlo, Division of GF Business Equipment, Inc.*, 215 NLRB No. 151. Thus Respondent's no-solicitation rule in effect on December 10 and 15, 1975, was unlawful on its face. Moreover, it was disparately applied since certain charitable solicitations were permitted. See *Oak Apparel, Inc.*, 218 NLRB No. 120.

As to the new rule, the Board recently has had occasion to consider the alleged justification for broader curtailment of employees' rights to engage in union solicitation in hospitals in *St. John's Hospital and School of Nursing, Inc.*, 222 NLRB No. 182. The employer in that case maintained a rule that prohibited employee solicitation for any purpose during working time or in working areas of the hospital, or in any area to which patients and

visitors have access, and prohibited distribution in any area except non-working areas where patients and visitors do not have access. The employer argued therein that health care operations are analogous to retail stores and warrant the broad no-solicitation, no distribution rules permitted in such establishments.[7] Patient care, so the argument went, requires that a hospital's services be free of the disruption which might result from solicitation and distribution of literature in any public area.

The Board partially rejected this argument and held that the employer violated Section 8(a)(1) by "maintaining an unlawful no-solicitation, no-distribution rule to the extent it prohibits all solicitation and distribution in all areas to which patients and visitors have access, other than immediate patient care areas." In so holding, the Board stated:

> We recognize that the primary function of a hospital is patient care and that a tranquil atmosphere is essential to the carrying out of that function. In order to provide this atmosphere, hospitals may be justified in imposing somewhat more stringent prohibitions on solicitation than are generally permitted. For example, a hospital may be warranted in prohibiting solicitation even on non-working time in *strictly patient care areas*, such as the patients' rooms, operating rooms, and places where patients receive treatment, such as x-ray and therapy areas. [Emphasis added.] Solicitation at any time in those areas might be unsettling to the patients—particularly those who are seriously ill and thus need quiet and peace of mind. Consequently, banning solicitation on non-working time in such areas as described

7 In retail stores it is lawful to prohibit all solicitation on the selling floor.

> above would seem justified in hospitals and to the extent that Respondent's rule prohibits such activity in those areas it is valid.
>
> Respondent's broad restrictions, however, are not justified by these considerations insofar as they apply to other areas.[3] As to the restriction in visitor access areas other than those involved in patient care, the possibility of any disruption in patient care resulting from solicitation or distribution of literature is remote. As to the restrictions in *patient access areas* such as cafeterias, lounges, and the like, we do not perceive how patients would be affected adversely by such activities. [Emphasis added.] On balance, the interests of patients well enough to frequent such areas do not outweigh those of the employees to discuss or solicit union representation.

3 Respondent's reliance on *May Department Stores Company, a Corporation, d/b/a Famous-Barr Company*, 59 NLRB 976 (1944), is misplaced. There the Board found that retail stores are justified in prohibiting solicitation on the selling floor since such solicitation, even on non-work time, would be disruptive of the store's relationship with its customers in the pursuit of its main function, i.e., selling merchandise. Respondent's basic function is patient care. It has not been shown that the prohibitions here discussed are necessary to avoid disruption of that function.

Respondent argues that the rationale of *St. John's Hospital* is essentially related to general hospitals and should not be applied to a specialized hospital such as Respondent's. Respondent operates a 200-bed hospital equally divided between adult care and pediatric care; and 15 to 20 research laboratories. There are approximately 650 employees working in the hospital and laboratories and the normal patient population is 50 adults, including

adolescents, and 50 children. Respondent provides medical care primarily to asthmatic patients who have been unable to cope with this condition on an outpatient basis.[8]

Aside from the specialized nature of the ailments treated, Respondent's hospital differs notably from a general hospital in that its patients may remain 6 to 9 months, or longer, 90 to 95 percent are ambulatory, and take their meals in the cafeteria, pediatric patients attend school in the facility and patients routinely receive a combination of medical and psychiatric care. Dr. John E. Sadler, Jr., coordinator of the Pediatrics-Behavioral Sciences Liaison Services, testified that asthma is considered a psychophysiologic disorder which has an organic, biological medical basis complicated by emotional factors such as stress, anxiety, anger, and tension. The extent to which an asthmatic can cope with these emotions can be a determining factor in how well he manages his asthma. Thus Respondent is concerned that it should provide an emotional climate as conducive as possible to helping the patients cope with the crises of daily living and that it not do anything harmful or upsetting to patients who, aside from the normal emotional problems incident to the disease, have the additional problem of being confined away from their families.[9]

Since one of Blake's warnings concerned soliciting in the cafeteria, much testimony was adduced as to the physical layout of the cafeteria and its utilization by patients

8 There are also some patients with other types of serious respiratory ailments and allergic and immunological difficulties.

9 Patients come from all over the country.

and staff. In general, the testimony developed in a manner indicating no essential dispute as to the physical layout. Thus there are two food service lines flowing in the same direction but separated by a food preparation area. Beyond these food service lines, the seating area is divided by floor to ceiling folding partitions installed between pillars. Smoking is permitted only in one designated area.

There are no restrictions as to patients and staff eating on either side of the partition except that during the evening meal only one side is open for dining. This is the side with the serving line without a cashier. During both breakfast and dinner, only the no-cashier serving line is in operation. Both serving lines are in operation during lunch and both sides of the cafeteria are open for dining. The smoking section is on the side with the cashier. John Quarton, hospital administrator, testified that although some patients are permitted to smoke, in 5 years he has never seen a patient smoking in the designated smoking area.[10] Quarton also admits that diners tend to sit on the side where their serving line is located . Since one side is a pay line and the other side is not, the patients tend to sit on the side with the no-pay line and 99 percent of the diners seated on the pay-line side are staff. For the evening meal the no-pay line side of the cafeteria is about evenly divided between patients and staff. It is not completely clear from

10 Blake described the cafeteria as having a patient side and a non-patient side. Sadler described the seating arrangement on both sides of the partition as being a mixture of patients and staff. I credit Quarton since, of the three, he is the only one who eats in the cafeteria daily. He testified that he eats in the cafeteria on the average of twice daily 5 times a week, sometimes more, and almost always lunch.

Quarton's testimony as to the distribution of patients and staff during breakfast.

Quarton testified that there is no regular routine as to the partition being opened or closed at meals except that it is normally open during holiday meals or for other special activities. Sadler testified that at breakfast and dinner the partition is most likely to be open, whereas at lunch, it is most likely to be closed. Quarton admits that the partition is closed 50 to 70 percent of the time during lunch, and that it is unlikely that a conversation on one side of the closed curtain would be heard on the other side.

I find that, as alleged in the complaint, Respondent's new no-solicitation rule is violative of the Act. Although Respondent's argument is related to "patient care—non-patient care" areas, the no-solicitation rule does not refer to such areas. Rather it bans solicitation in *any public area within the hospital premises*, and further explains that *any solicitation must be confined to non-work and non-public areas and during non-working time*. It is thus clear that the rule bans solicitation in work areas which could not meet any definition of "patient care area," such as certain offices and research laboratories. Furthermore, the prohibition of solicitation in any public area within the hospital premises appears to be based on the arguments rejected by the Board in *St. John's Hospital, supra*, that hospitals should be permitted the same broad restrictions on solicitation as permitted in a retail establishment. In rejecting this argument, the Board recognized that, just as retail stores are justified in prohibiting solicitation on the selling floor since such solicitation, even on non-work time, would be disruptive of the store's relationship with its customers

in the pursuit of its main function of selling merchandise, so the hospital was entitled to prohibit all solicitation which was disruptive of the hospital's main function of patient care. However, the Board found that only solicitation in patient care areas was so disruptive and there was no showing that prohibitions in "visitor access areas" other than those involved in patient care, and patient access areas, such as cafeterias, lounges, and the like, are necessary to avoid disruption of the patient care function.

Here, Respondent's use of the term "public area within the hospital premises" clearly includes visitor access areas other than those involved in patient care. Falling within the literal meaning of "public area within the hospital premises" would be the surrounding grounds. Thus an employee could reasonably interpret Respondent's rule as prohibiting solicitation during non-work time in areas of Respondent's premises which are not patient care areas. The ambiguity of the rule is underscored by the contradictions in the testimony of Respondent's witnesses, particularly as to whether the cafeteria was a patient care area or a public area. Any risk of ambiguity in the wording of its rule must be borne by Respondent. See *N. L. R. B. v. Harold Miller, etc., d/b/a Miller-Charles and Company*, 341 F. 2d 870 (C. A. 2); *Boaz Spinning Company, Inc.*, 210 NLRB 1078. Furthermore, MacDevitt made the intended scope of the solicitation prohibition quite clear when he explained to Blake that solicitation must be restricted to "when he was on a break or was on his lunch hour and outside hospital premises."

Respondent's basic argument is that its patient care areas must be defined in a far broader manner than it is in

St. John's Hospital, supra. This argument is based on the fact that almost all of its patients are ambulatory; some of these ambulatory patients carry, and use, oxygen and intravenous fluids equipment with them as they move around the facility; and that it is important to the treatment of its asthmatic patients to eliminate stress and anxiey situations.

Respondent therefore argues that its patient care areas include all areas where patients and staff responsible for their well-being appear together. I am not persuaded by this argument. In *St. John's Hospital, supra*, the Board differentiated between patient care areas such as patients' rooms, operating rooms, places where patients receive treatment, such as x-ray rooms and therapy areas; and patient access areas such as cafeterias, lounges, and the like, and found, on balance, that the interest of patients well enough to frequent such areas do not outweigh those of the employees to discuss or solicit union representation. As to those areas defined therein as patient care areas, the Board stated: "Solicitation at any time in those areas might be unsettling to the patients—particularly those who are seriously ill and thus need quiet and peace of mind."

I interpret this to indicate a difference between areas set aside specifically for treatment of patients under controlled conditions and those, such as patients' rooms, to which patients may reasonably expect to repair for peace and tranquility; and areas where patients mingle with many other patients and the visiting public without prohibition. The record indicates that solicitations are permitted for United Way and United Jewish Appeal, the patients herein converse, and indeed express differences of opinion in these social sttings without general restriction as to subject matter. There is no evidence that employees are restricted

from discussing whatever they wish in the cafeteria, except union soliciation. There is no evidence that the alleged avoidance of patient anxiety and stress extends to censorship of television viewing except to the same extent many parents screen viewing in accordance with the parental guidance ratings of movies and television programs. Sadler testified that the visit of Santa Claus at Chiristmas, attending school, observing an argument, or the visit of relatives might precipitate an asthmatic attack in some minor patients. Yet there is no evidence that these potentially disturbing experiences are precluded. In fact, in my opinion, a fair valuation of Sadler's testimony is that a major purpose of patient care is not to completely insulate the patients but rather to help them to cope, without medical incident, with ordinary everyday occurrences and relationships.

I also reject Respondent's argument as to staff supervision being a determinative factor in defining patient care areas. It seems apparent that staff supervision in such areas as the cafeteria is necessitated more because the patients are children than because they are ill. Thus Sadler defined patient care areas as "the area that our staff have them" and that this included supervision while patients are in the cafeteria, the solarium, the recreation rooms, the gymnasium and the school classrooms. In further defining the cafeteria as a work area, he spoke of staff supervision in terms of "getting them their meals ordered, getting them served, getting them through the line, taking care of them so that they are orderly in the cafeteria as kids. Those are work areas where my staff needs to be concentrating on what's going on with the kids." There is no evidence of similar supervision of adult patients. The fact that some pediatrics personnel have work duties in the cafeteria cer-

tainly means that the particular staff members are then on working time but it does not make the cafeteria a general work area, any more than the work of the kitchen personnel would make the cafeteria a general work area.

Respondent further argues that employees are permitted to solicit in the staff lounges and the staff locker rooms and there is no showing that the four lounge areas and the two locker rooms provided inadequate access to the employees by the Union. Respondent mistakes the burden of proof. It is for Respondent to show that a broad restriction on solicitation is warranted. However, to the extent that this contention may be relevant to a balancing of interest in defining patient care areas, I find that permission to solicit in the lounges and locker rooms does not provide nearly as effective access as the cafeteria, for more employees use the cafeteria for breaks than use the lounge, and the locker room in general would restrict access to those of the same sex.

Accordingly, I find that Respondent's new no-solicitation rule prohibited solicitation in non-patient care areas and that there is no showing that broader prohibitions of union solicitation are nececsary to avoid disruption of patient care. I therefore find that by promulgating and maintaining its new no-solicitation rule, Respondent has violated Section 8 (a) (1) of the Act.

I further find that by following Blake on December 15 as he was soliciting in the cafeteria, Respondent, through Hurias,[11] engaged in surveillance of Blake's union activities

11 Hurias was on the payroll of a canteen service but worked under Respondent's direction and is an admitted supervisor and agent of Respondent.

in violation of Section 8(a)(1) of the Act. In reaching this conclusion, full consideration has been given to Respondent's arugment that Hurias' job was to watch the entire cafeteria for problems and to make sure everything was running smoothly, and he was simply performing his job. However, Hurias' action in following Blake indicates something more than an observation incidentally made in the course of the normal activity of overseeing the dining room; and any possible doubt as to the purpose of Hurias' action is disspelled by Wilson's statement that management was upset by his lunchtime soliciting that day, and this was "just to tell him they were watching him." See *National Tape Corporation*, 187 NLRB 1321.

The complaint alleges that the Respondent has disparately applied and enforced its no-solicitation rule in violation of Section 8(a)(1) of the Act. Respondent argues that there is no evidenec of disparate enforcement. However, the evidence clearly shows that both rules were enforced against Blake and that some charitable solicitation is permitted. Since I have found the no-solicitation rules to be violative of the Act, I further find that the written warning issued to Blake on December 15[12] and the oral reprimand on January 7 are violative of Section 8(a)(1) of the Act.

B. Blake's Discharge

1. Facts

On March 5, 1976 when Blake reported for work, he was discharged. According to Blake he was in the inhalation therapy office when Wilson said "Shut the door, I

12 This is not alleged as violative of Section 8 (a) (3) of the Act.

want to talk to you about something. You've really missed the boat on professionalism." She then showed him a letter dated February 27, 1976 from a former patient, Meyer Sharlin, who is also one of Respondent's national trustees,[13] addressed to Richard Bluestein, Respondent's executive vice president. Blake read the letter, the body of which reads:

> Following your phone call over a week ago:[14] I am summarizing a conversation I had with a hospital employee named Richard. This took place on or about February 13 or 14.
>
> Please bear in mind the little contact I had with him related only to the medication and machines in Inhalation Therapy, so I was surprised at this (sic) remarks which were as follows:
>
> (While I waited for my medication)
>
> *Richard:* "I understand you're some kind of big shot in the hospital."
>
> *My reply:* "No, I'm a patient."
>
> *Richard:* "That's not what I hear—you're on the Board."
>
> (Not feeling well I was annoyed somewhat and reminded him I would like my medication . However, he kept on.)

13 Respondent has two trustee boards. The resident board which consists of approximately 40 persons, residents of Denver, is empowered to establish policy which serves as operational guidelines for the Hospital. The national board, which consists of approximately 175 persons, serves in a public relations and fund-raising capacity only.

14 Sharlin testified that following his complaint about this incident Bluestein telephoned him and asked him to set forth the incident in a letter.

> *Richard:* "Didn't you give a room on the second floor?"
>
> *My reply:* "Yes, a lot of people donate to the hospital; it exists through contributions."
>
> *Richard:* "How much does a room like that cost?"
>
> (At this point I did not answer so he repeated the question. Realizing that he was not going to let up I said that donations are made from $500 up to $100,000 or more.)
>
> *Richard:* "How much was the room?"
>
> *My reply:* "$10,000."
>
> While I was receiving my treatment he started the conversation again.
>
> *Richard:* "Maybe I shouldn't ask you this but I will since you're on the Board and might be able to help."
>
> *My reply:* "What's your problem?"
>
> *Richard:* "The clerk's union [15] is trying to organize us."
>
> (By *"us"* he indicated the non-professionals such as inhalation therapists and others. He continued)
>
> "Maybe you can take this up with the board. We would rather work with the AFL/CIO and get a better deal."
>
> *My reply:* "I can't help you. I don't know what you're talking about. Have you talked with anyone in administration?"

15 Blake testified that he engaged in no organizing activities on behalf of the Retail Clerks Union and that, to his knowledge, neither the Retail Clerks Union nor any labor organization other than the Union herein was engaged in any organizational activity among Respondent's employees during the times material herein.

Richard: No, we talked to the personnel director."

(Then he mentioned it didn't make any difference anyway because they have a court case pending.)

My reply: "This is a non-profit hospital and it is very difficult raising money. Furthermore, this conversation is disturbing me."

Richard: "They raised $13,000,000 last year and spent $13,000,000. Dr. Farr raised $4,000,000."

(*He mentioned Dr. Farr twice & the 4M.* [The italicized sentence is a handwritten insert.]

I was surprised at his quoting these amounts and remarked that Dr. Farr was a very dedicated man and where did he get all his information.[16] Also, that it wouldn't be a bad idea if he dedicated more time and interest to his job, and suggested he take his problems to the proper people.

My impression was that he thought I could be influential in some way, perhaps avoiding a court suit.

At no time before or during the conversation did I mention I knew anyone or that I was a trustee of the hospital. I was surprised at his knowledge of the finances.

Please let me know if I can be of further help.

Blake further testified that Wilson then said "Well, Mr. Sharlin had several other complaints about the hospital, but this does not excuse you. I'm going to terminate you—fire you." Blake said "Well, wait a minute—I've got to have a witness." Whereupon he left and returned with Rachel Sosa, an evening shift housekeeper,

16 Blake testified that he does not recall mentioning Dr. Farr.

and Wilson obtained Nursing Supervisor Miller as her witness. Wilson told him to go to the personnel office for his termination notice and final check. Thereafter Blake asked Wilson for a copy of Sharlin's letter. She refused. Whereupon he went to the office of Don Evans, administrative coordinator, and asked him for a copy of the letter. Evans told Blake to leave his office or he would call the guard.

Blake then went to the personnel office where he received his final check and the following termination notice:

DISCHARGE NOTICE

Employee Name: Richard Blake Date: 3-5-76

You are hereby terminated from employment with National Jewish Hospital and Research Center for the following reason(s): inconsiderate treatment of a patient.

Previous violations:

Date: 1. 12-15-75; Violation: Soliciting during working hrs.; Action Taken: Written warning

Date: 2. 1-6-76; Violation: Soliciting in unauthorized area; Action Taken: Defined areas where permitted

Date: 3. 2-12 76; Violation: Leaving s treatment set-up; Action Taken: Emphasize necessity of communication c staff & patients

Date: 4. 3-2-76; Violation: Unavailability for tx; Action Taken: Reminded of importance of being available—and whereabouts being known

Employee length of service: .....

/s/ Phyllis A. Wilson

.....
Department Head

.....
Personnel Director

According to Blake, Wilson said he was terminated for harassment of a patient. She did not use the term "inconsiderate treatment" as set forth in the discharge notice, nor did she mention the previous violations.

Wilson's version of the termination interview differs somewhat from Blake's. According to her, when Blake came into the office, she told him she felt he had a very poor understanding of professionalism. She then showed him Sharlin's letter and asked for his version. Blake said he did not think he should give it, but that Sharlin's account of the conversation was incorrect. Later, he said he really could not remember the conversation because it was so long. Wilson said that under the circumstances she thought it was very inconsiderate treatment of a patient and considering some of his other patient care,[17] that she felt he should be terminated.

Blake did not deny that he first refused to give his version of the conversation with Sharlin and later stated that he could not recall what was said, nor does his version of the termination interview indicate that he gave Wilson his account of the conversation with Sharlin. However, he testified that the version set forth in the Sharlin letter is not an accurate reflection of what occurred. According to Blake, shortly after Sharlin was

17 Wilson testified that she was referring to the February and March incidents listed under previous violations on the termination notice.

admitted to the Hospital he introduced himself to Blake as a member of Respondent's board of directors. Then, around the middle of February, as he was giving Sharlin a treatment, Blake, Sharlin and Mrs. Sharlin had a casual conversation during which Blake mentioned that he had seen a plaque indicating that Sharlin had donated a room to the Hospital. Sharlin said the room had cost him $10,000.

Shortly thereafter, according to Blake, when he was giving Sharlin a treatment, Sharlin complained about various aspects of the treatment. Then he said that he understood Blake was having another kind of problem. Assuming that Sharlin was referring to the Union, Blake said "Well, it depends on who you're talking to whether it's a problem or not." Sharlin said, "Well, I'm on the Board; what's the problem? Maybe I can help. You hear everything when you're on the Board." Blake said "Well, you're a patient. I really shouldn't talk to you about it." Sharlin said it would not hurt to talk and then said "Incidentally, who are they talking to?" Blake replied "The ward clerks, nurses aides, nurses, therapist, janitorial—everybody." Sharlin said "Well, this place is always in the red. We can't afford anything like that." Blake said "Well, the place takes in millions. I disagree—the place takes in millions, and only 2 or 3 percent actually goes for salaries." At this point, according to Blake, Sharlin became angry and he is not sure what Sharlin said.

Meyer's testimony as to this conversation with Blake is consistent with the account set forth in the letter. He specifically denies any mention of wages or working con-

ditions or that he said he was a trustee. He admits that if asked he would have affirmed this position but does not recall ever being asked by any employee. Additionally he states that he told Blake that he did not want to help him, that he could not, and that he had nothing to do with the board or the Hospital and then he left without finishing his treatment. Sharlin further testified that he was so annoyed that the next day he telephoned Bluestein to report the incident. Bluestein was out of town so he reported it to Harry Aschkinasi, director of financial development. Aschkinasi asked him to write a letter to Bluestein regarding the matter and Sharlin said he would.

Robert MacDevitt, personnel director, testified that he was in Bluestein's office when Aschkinasi reported the Sharlin-Blake incident to him. MacDevitt suggested that Sharlin be requested to state his complaint in writing so that Blake could be confronted with it and explain the incident. Bluestein then telephoned Sharlin and requested that he outline in detail what had occurred.

According to MacDevitt, when he received the Sharlin letter, he asked Wilson to look at it, said it seemed to be a very serious charge and that she should fully investigate it with Blake. He further said any decision as to what to do concerning the incident was left to her but that she should immediately discuss the matter with Blake and inform MacDevitt of her decision since if the decision was adverse to Blake, it would probably be submitted to grievance.

On the day of his termination, according to MacDevitt, Blake asked him if they could have a grievance

meeting. MacDevitt agreed to a meeting for the next day. Thereafter MacDevitt postponed the meeting and the grievance meeting was held on March 10.[18] According to MacDevitt, at this meeting, he asked Blake to explain his side of the story. Blake said Sharlin's account was not true. MacDevitt asked him to explain what did occur. Blake replied this is the only thing I am going to say and left.[19] Blake did not testify as to what occurred at this grievance meeting nor did he deny MacDevitt's version.

2. Conclusions

Respondent argues that Blake was properly discharged, based on Sharlin's version of the Sharlin-Blake incident. Charging Party argues that this alleged reason is pretextual and that Respondent's motivation in discharging Blake was that Blake "as far as this record discloses, was the only employee actively soliciting for the Union."[20] General Counsel also argues that the Sharlin-Blake incident was seized upon by Respondent as a pre-

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18 MacDevitt states that he postponed the meeting because he wanted to speak to Wilson first and then a weekend intervened.

19 When Blake reported for the grievance meeting, he was accompanied by Les DeLaBriandais, union president. DeLaBriandais asked MacDevitt if he could attend the grievance meeting. MacDevitt refused, stating that hospital policy did not permit outside persons to attend a grievance meeting but that Blake could be accompanied by an employee of his choice.

20 Since the General Counsel has the burden of establishing unlawful motivation and since the record does not establish that Blake was the only employee actively soliciting for the Union, a finding of unlawful discharge cannot be based on an assumption of the exclusivity of Blake's union activities.

text for Blake's discharge, the true reason being his union activity, but further argues that, at the very least, Blake's discharge was partially motivated by his violations of the invalid no-solicitation rules.

I find some merit in Respondent's argument that in view of Blake's failure to give his account of what occurred, the Blake-Sharlin incident as reported by Sharlin would constitute ample justification for Blake's discharge. The issue however is not whether the incident would constitute such justification but whether, in fact, Blake's discharge was motivated solely by this incident, or whether it was motivated in whole, or in part, by Blake's union activities.

Wilson testified that she made the decision to discharge Blake and that she prepared the termination notice. This notice states that he was terminated for "inconsiderate treatment of a patient" and then lists under "Previous violations" the December 15 and January 16 reprimands for violation of the no-solicitation rules, and incidents on February 12 and March 2 involving handling of his work duties.

She admits that the decision to discharge Blake was not motivated solely by the Sharlin incident, and that when MacDevitt gave her the Sharlin letter, he told her he thought that in reaching a decision, she should take into consideration Blake's other working record. He allegedly did not specify what portion of his record she should consider.

Wilson further admitted on direct examination that although the Sharlin matter precipitated Blake's discharge, it was not the sole reason for his discharge but

rather that his previous violations were taken into consideration along with the Sharlin incident. She then testified:

Q. Did that include the solicitation situations? Did you take that into consideration in your termination of Mr. Blake?

A. Not really because it didn't—it was taken into consideration only because it was on the chronological record and that it had happened. But I was more concerned with treatment care.

* * *

Q. (By Mr. Cleveland) Were you aware at the time of discharging Mr. Blake that he was active in any union activities in the hospital?

A. Yes.

Q. Did those activities interfere with his—in any way with his doing his job?

A. They hadn't recently—I mean, at the time.

Q. At the time of what?

A. At the time of his discharge they weren't, no.

Q. So did you take into consideration the Union activities when you terminated him as a reason for—was one of your reasons for terminating Mr. Blake—

A. No.

On cross-examination, Wilson testified:

Q. Now, you also testified that you considered the previous violations in making the decision regarding the discharge. Did you inform Mr. Blake about this?

A. Yes, I told him it was about his work record. I mean in consideration of his work record along with the letter.

Q. So then you didn't limit it solely to inconsiderate patient care?

A. That that was the climax of it, but his work record had been taken into consideration.

* * *

Q. Mrs. Wilson, I hand you what's been marked as General Counsel's Exhibit 3. [Blake's termination notice] It's correct, is it not, that under previous violations there are four previous violations listed there?

A. Right.

Q. I mean, it's your testimony that you considered only two?

A. I considered—yes.

Q. Why are the others on this discharge notice?

A. Because they are violations of hospital policy.

Q. And do you consider them serious violations of hospital policy?

A. Yes.

Q. And yet your testimony is that they were not taken into consideration in making the discharge decision; isn't that correct?

A. Not entirely, no, because my main concern was patient care.

Q. Okay; speaking of patient care, Mrs. Wilson, are you familiar with the hospital's no-solicitation rule?

A. Yes.

Q. Do you consider that a part of patient care—enforcement of that rule?

A. If it interferes with patient care, yes.

Considering the totality of Wilson's testimony as to the reasons for Blake's discharge, I do not credit her assertion that she did not take into consideration Blake's union activities in reaching the decision to terminate him. Although she is quick to answer in the negative when the term "union activities" is used and she attempted to downplay her consideration of Blake's violation of the no-solicitation rule, a fair evaluation of her testimony forces the conclusion that she did consider the violations of the no-solicitation rules in reaching her decision to discharge Blake. This conclusion is buttressed by her listing Blake's violation of the no-solicitation rules on the termination notice, MacDevitt's instructions to her to consider Blake's work record, her admitted statement to Blake during the termination interview that his discharge was motivated by his work record along with the Sharlin letter, her admission that she considered these violations of the no-solicitation rules as serious, and was on notice that Respondent's management considered them as serious enough for a written warning and to warrant "watching him."

In these circumstances, I find that Blake's discharge was motivated, at least in part, by his violation of the no-solicitation rules. Since I have found the no-solicitation rules to be invalid, the rules can provide no justification for Blake's discharge and the discharge is unlawful unless Respondent establishes that the solicitations interfered with Blake's own work or that of other employees or that it in fact disrupted patient care. See *Daylin Inc., Discount Division d/b/a Miller's Discount Dept. Stores,* 198 NLRB 281. This Respondent has failed

to establish. Thus when Blake solicited Turner, Blake's shift had not begun, nor was Turner performing any work. The entire conversation occurred while waiting for, and riding on, an elevator. There is no evidence that any patients were present. As to the cafeteria solicitations, Blake was on lunch break and there is no evidence that he spoke to employees who were not also on lunch break or that patient care was disrupted in any way.

Accordingly, I find that Blake was discharged in violation of Section 8(a)(1) and (3) of the Act. Assuming that the discharge was also motivated by the Sharlin incident does not affect this conclusion since one of the reasons for his discharge was unlawful. *Crenlo, Division of GF Business Equipment, Inc.,* 215 NLRB No. 151; *Capital Broadcasting Corporation,* 197 NLRB 1108; *Hugh H. Wilson Corporation,* 171 NLRB 1040, 1046.

Upon the basis of the foregoing findings of fact and the entire record, I make the following:

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By maintaining a no-solicitation rule which requires employees to obtain Respondent's prior approval for solicitation for any purpose, Respondent has violated Section 8(a)(1) of the Act.

4. By promulgating and maintaining a no-solicitation rule which prohibits employees from soliciting for the Union during their nonwork time in areas of the hospital other than immediate patient care areas, and from distributing union literature in nonworking areas during employees' nonworking time, Respondent has violated Section 8(a)(1) of the Act.

5. By issuing a written warning notice on December 15, 1974 and an oral reprimand on January 7, 1975 to Richard Blake for soliciting contrary to its illegal no-solicitation rules, Respondent has violated Section 8(a)(1) of the Act.

6. By engaging in surveillance of Richard Blake's union activities on January 7, 1975, Respondent has violated Section 8(a)(1) of the Act.

7. By discharging Richard Blake because he engaged in union activities, Respondent has discouraged union membership in violation of Section 8(a)(1) and (3) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that the Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully discharged Richard Blake, I recommend that Respondent offer him

immediate reinstatement to his former job or if that position is no longer available to a substantially equivalent position without prejudice to his seniority or other rights and privileges. I further recommend that Blake be made whole for any loss of pay or other benefits suffered by him as a result of the discrimination against him with interest thereon as provided in *F. W. Woolworth Company,* 90 NLRB 289, and *Isis Plumbing & Heating Co.,* 138 NLRB 716.

As the unfair labor practices committed by the Respondent are of a character which go to the very heart of the Act, I shall recommend an order requiring the Respondent to cease and desist therefrom and to cease and desist from infringing in any other manner upon the rights of employees guaranteed by Section 7 of the Act.

Upon the foregoing findings of fact, conclusions of law and the entire record, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I hereby recommend the following:[21]

ORDER

Respondent National Jewish Hospital and Research Center, its officers, agents, successors, and assigns, shall:

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21 In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Promulgating any rule or regulation prohibiting its employees from soliciting on behalf of any labor organization on Respondent's premises other than immediate patient care areas during nonworking time, or prohibiting the distribution of union literature in nonworking areas during employees' nonworking time.

(b) Reprimanding or warning employees for engaging in union solicitation as protected by the Act.

(c) Engaging in surveillance of the union activities of its employees.

(d) Discouraging membership in Service Employees International Union, Local 105, or any other labor organization by discharging employees because they engage in union activities.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of the right to self-organization, to form or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Rescind its rule restricting the areas in which employees may solicit on behalf of a labor organization during the employees' non-working time insofar as it applies to other than immediate patient care areas, and prohibiting distribution of union literature during employees' nonworking time in nonworking areas of its operations.

(b) Expunge from its records any written warnings, reprimands, or counseling reports issued to Richard Blake as a result of his protected concerted activities on December 15, 1975 and January 7, 1976.

(c) Offer to Richard Blake immediate reinstatement to his former job or if that position no longer exists, to a substantially equivalent position, without prejudice to seniority or other rights and privileges and make him whole for any loss of earnings suffered by reason of the discrimination against him in the manner set forth in the section of this Decision entitled "The Remedy."

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Hospital copies of the attached notice marked "Appendix."[22] Copies of said notice on forms

22 In the event that the Board's order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

provided by the Regional Director for Region 27, of the National Labor Relations Board, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by Respondent for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 27, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated: June 23, 1976.

/s/ Earldean V. S. Robbins
Administrative Law Judge

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

AFTER A TRIAL IN WHICH BOTH SIDES HAD THE OPPORTUNITY TO PRESENT THEIR EVIDENCE, THE NATIONAL LABOR RELATIONS BOARD HAS FOUND THAT WE VIOLATED THE LAW AND HAS ORDERED US TO POST THIS NOTICE.

The National Labor Relations Act gives all employees the following rights:

To organize themselves.

To form, join or support unions.

To bargain as a group through a representative they choose.

To act together for collective bargaining or other mutual aid or protection.

To refrain from any or all of those activities.

WE WILL NOT do anything to interfere with these rights. More specifically:

WE WILL NOT promulgate any rule or regulation prohibiting you from soliciting on behalf of any labor organization on our premises other than in immediate patient care areas or prohibiting the distribution of union literature in nonworking areas during your nonworking time.

WE WILL NOT reprimand or warn or counsel you for engaging in union solicitation on our premises during nonworking time in areas other than immediate patient care areas.

WE WILL NOT engage in surveillance of your union activities.

WE WILL NOT discourage membership in Service Employees International Union, Local 105, or any other labor organization, by discharging you because you engage in union activities.

WE WILL NOT in any other manner interfere with, restrain or coerce you in the exercise of the right to self-organization, to form or assist labor organizations, to bargain collectively through representatives of your own choosing, and to engage in concerted activities for the purpose of mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized

in Section 8 (a) (3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

WE WILL rescind our rule restricting the areas in which you may solicit on behalf of a labor organization during your nonworking time insofar as it applies to other than immediate patient care areas, and prohibiting distribution of union literature during your nonworking time in nonworking areas of our operations.

WE WILL expunge from our records any written warnings, reprimands or counseling reports issued to Richard Blake as a result of his protected concerted activities on December 15, 1975, and January 7, 1976.

WE WILL offer to Richard Blake immediate reinstatement to his former job or, if that position no longer exists, to a substantially equivalent position, without prejudice to seniority or other rights and privileges and WE WILL make him whole for any loss of earnings suffered by reason of the discrimination against him.

National Jewish Hospital and
Research Center
(Employer)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, U. S. Custom House, Room 260, 721 - 19th Street, Denver, Colorado 80202, Telephone Number: (303) 837-3551.

APPENDIX B

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 77-1061

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

NATIONAL JEWISH HOSPITAL AND RESEARCH CENTER,

Respondent.

On application for enforcement of an order of the National Labor Relations Board.

(Filed July 28, 1978)

Andrew F. Tranovich, National Labor Relations Board, Washington, D. C. (John S. Irving, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Carl L. Taylor, Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, and John D. Burgoyne, Attorney, National Labor Relations Board, Washington, D. C., on the brief), for Petitioner.

Henry C. Cleveland III of Saunders, Snyder, Ross, and Dickson, P. C., Denver, Colorado, for Respondent.

Before DOYLE and LOGAN, Circuit Judges, and STANLEY, Senior District Judge.*

DOYLE, Circuit Judge.

The National Labor Relations Board seeks enforcement of its order against the National Jewish Hospital and Research Center, following adjudication by the Board that the hospital had violated § 8 (a) (1) of the National

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*Of the District of Kansas, sitting by designation.

Labor Relations Act when it promulgated and enforced overly broad "no-solicitation" rules applicable to the hospital premises. The controversy extended to other violations which will be discussed.

I.

Until December 15, 1975, respondent had a "no-solicitation" rule, which provided:

> Solicitations, collections and petitions for outside agencies are permitted only on approval of the administrator.

In November 1975, Richard Blake, an employee of the hospital, commenced organizing for the Service Employees International Union Local 105. On December 10, 1975, Blake solicited an employee named William Turner in one of the hospital buildings and asked him to sign a union authorization card and gave him such a card. On December 15, Phyllis Wilson, who was Blake's supervisor, summoned him and accompanied him to the office of the personnel director for the hospital, Robert MacDevitt. Blake was given a warning notice by MacDevitt for violating the "no-solicitation" rule. He said that his concern was the solicitation of an employee who was on duty at the time.

A revised rule was then posted (on December 17). This regulation did give recognition to the right of solicitation, but prohibited it from any public area within the hospital. Solicitation was confined to nonwork and nonpublic areas "during non-working time."

On January 7, 1976, in the hospital cafeteria, Blake sought the signatures of various employees on union au-

thorization cards. As a result, on the following day, surveillance of Blake was started. He was watched in the cafeteria where the supervisor who watched him maintained a very short distance from him. He was told by his supervisor, Phyllis Wilson, that he was being watched and that the cafeteria was a public place where he was not entitled to solicit.

The next incident occurred on March 5, 1976. On that date, Blake was shown a letter from an individual who had been a patient there and who was a national trustee of the hospital. This letter contained a complaint against Blake as a result of a conversation that Blake had with the writer, Sharlin, while the latter was waiting to receive medication. In essence, it said that Blake solicited the aid of Sharlin in organizing the non-professional employees of the hospital. Sharlin refused to help. The letter said that Blake had mentioned the fact that Sharlin was a member of the board of trustees and had donated a room and had asked him how much he donated. Sharlin had other complaints, which he expressed in the letter, besides Blake. After showing the letter to him, Phyllis Wilson fired him. The personnel office delivered a termination notice to Blake, which stated that his termination was a result of his inconsiderate treatment of a patient. The notice did, however, set forth the two previous solicitations of Blake, which have been described.

The discipling and firing of Blake resulted in the Service Employees International Union, Local 105, filing complaints which were served on the hospital on January 15, 1976, and on March 9, 1976. The two complaints were consolidated and were issued on April 20, 1976, alleging

that the hospital had violated § 8 (a) (1) and (3) of the National Labor Relations Act. The cause was tried before an administrative law judge, Earldean V. S. Robbins.

II.

The issues heard before the administrative law judge were whether the respondent hospital:

a. Had promulgated an illegal no-solicition and no-distribution rule.

b. Had disparately applied and enforced illegal no-solicitation rules.

c. Had engaged in unlawful surveillance of an employee's protected activity.

d. Had discharged Blake because of his activities on behalf of the union.

III.

The opinion of the administrative law judge, which was adopted in its entirety by the Board, condemned both the original and revised no-solicitation rules of National Jewish Hospital. The original of these, it held, was invalid because it required prior permission for any solicitation. The revised one, which prohibited employee solicitation during nonworking hours in working areas other than patient care areas, was ruled to be a violation of § 8 (a) (1) of the Act. The hospital was also found to have violated the Act (§ 8 (a) (1)) by issuing a written warning to employee organizer Blake for his first infraction of the invalid no-solicitation rule and by the oral reprimand for a second such violation and by engaging in surveillance of Blake's activities in the cafeteria.

The administrative law judge further found that Blake's discharge violated § 8 (a) (1) and (3), 29 U. S. C. § 158 (a) (1), (3) (1970). Respondent was ordered to cease and desist prohibiting its employees from soliciting on behalf of any labor organization on the premises other than in immediate patient care areas during nonworking time or in other ways interfering with employees' rights under the National Labor Relations Act.

The judge also ordered that Blake be reinstated with back pay, with his records expunged of the two unlawful warnings and reprimands, and that a notice be posted. The Board affirmed the decision with only minor modifications.

The legal background for this decision must be considered briefly. Both the administrative law judge and the Board, in reaching the decision which we are reviewing, were following the Board's decision in St. John's Hospital and School of Nursing, Inc., 222 NLRB 182. Subsequent to the issuance of the Board's decision in the case before us, this court had before it an enforcement proceeding in St. John's Hospital & School of Nursing, Inc. v. NLRB, 557 F. 2d 1368 (1977). A panel of this court denied enforcement of the Board's order in a substantial respect. The Board had ruled that employees should have access for solicitation purposes to all areas of the hospital except strict patient care areas. This court, however, determined that insofar as the Board's order permitted solicitation in areas of the hospital to which patients had access, it was not entitled to be enforced. *See* St. John's Hospital & School of Nursing, Inc. v. NLRB, *supra*. The reasoning was that the hospital's interest in having a tranquil atmosphere for patients required that it

be free to prohibit solicitation not only in strict patient care areas but, in addition, in areas accessible to patients such as hallways, stairs, elevators, waiting rooms and public cafeterias and gift shops. The sweep of the order was such as to preclude solicitation except in employee-only lunchrooms and cafeterias, locker rooms, restrooms and parking areas.

At about the same time that this court rendered its decision in *St. John's Hospital,* the First Circuit reached a contrary result in NLRB v. Beth Israel Hospital, 554 F. 2d 477 (1st Cir. 1977), *aff'd,* 46 U. S. L. W. 4764 (U. S. June 22, 1978). It held that a no-solicitation rule in areas accessible to patients was illegal and was not to be enforced in a cafeteria and coffee shop, notwithstanding that some patients patronized these places. The hospital rule there was not unlike the one in the instant case in the respect that it limited solicitation to locker rooms and certain restrooms. *Id.* at 579 n. 1.

On June 22, 1978, the Supreme Court affirmed in all aspects the ruling of the First Circuit in *Beth Israel Hospital,* in upholding the ruling of the First Circuit that the Board's order was entitled to be enforced. This in effect upheld the Board's ruling in the instant case. The effect is then that insofar as this court modified the Board's ruling by denying enforcement of parts of its order, *St. John's Hospital* can no longer be considered law.

The Supreme Court spoke with approval of the Board's conclusion that the strict rules against solicitation applied only to patients' rooms, operating rooms and

places where patients received treatment, such as x-ray and therapy rooms. On this the Court said:

> The Board concluded that prohibiting solicitation in such situations was justified and required striking the balance against employees' interests in organizational activity. The Board determined, however, that the balance should be struck against the prohibition in areas other than immediate patient care areas such as lounges and cafeterias absent a showing that disruption to patient care would necessarily result if solicitation and distribution were permitted in those areas. The Board concluded, on a record devoid of evidence which contradicted that assessment, that the possibility of disruption to patient care in those areas must be deemed remote.

46 U. S. L. W. at 4767.

It is clear that the consequence of the Supreme Court's affirmance of the First Circuit enforcement of the Board's decision in *Beth Israel Hospital* is that the Board's decision in this case is also entitled to be approved and enforced in all aspects.

Accordingly, we determine that the order of the Board should be and the same is enforced.

APPENDIX C

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 77-1061

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

NATIONAL JEWISH HOSPITAL AND RESEARCH CENTER,

Respondent.

On application for enforcement of an order of the National Labor Relations Board.

(Filed November 2, 1978)

Andrew F. Tranovich, National Labor Relations Board, Washington, D. C. (John S. Irving, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Carl L. Taylor, Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, and John D. Burgoyne, Attorney, National Labor Relations Board, Washington, D. C., on the brief), for Petitioner.

Henry C. Cleveland III of Saunders, Snyder, Ross, and Dickson, P. C., Denver, Colorado, for Respondent.

Before DOYLE and LOGAN, Circuit Judges, and STANLEY, Senior District Judge.*

DOYLE, Circuit Judge.

The National Labor Relations Board seeks enforcement of its order against the National Jewish Hospital and Research Center, following adjudication by the Board that the hospital had violated § 8 (a) (1) of the National

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*Of the District of Kansas, sitting by designation.

Labor Relations Act when it promulgated and enforced overly broad "no-solicitation" rules applicable to the hospital premises. The controversy extended to other violations which will be discussed.

I.

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A revised rule was then posted (on December 17). This regulation did give recognition to the right of solicitation, but prohibited it from any public area within the hospital. Solicitation was confined to nonwork and nonpublic areas "during non-working time."

On January 7, 1976, in the hospital cafeteria, Blake sought the signatures of various employees on union authorization cards. As a result, on the following day, surveillance of Blake was started. He was watched in the cafeteria where the supervisor who watched him maintained a very short distance from him. He was told by his supervisor, Phyllis Wilson, that he was being watched and that the cafeteria was a public place where he was not entitled to solicit.

The next incident occurred on March 5, 1976. On that date, Blake was shown a letter from an individual who had been a patient there and who was a national trustee of the hospital. This letter contained a complaint against Blake as a result of a conversation that Blake had with the writer, Sharlin, while the latter was waiting to receive medication. In essence, it said that Blake solicited the aid of Sharlin in organizing the non-professional employees of the hospital. Sharlin refused to help. The letter said that Blake had mentioned the fact that Sharlin was a member of the board of trustees and had donated a room and had asked him how much he donated. Sharlin had other complaints, which he expressed in the letter, besides Blake. After showing the letter to him, Phyllis Wilson fired him. The personnel office delivered a termination notice to Blake, which stated that his termination was a result of his inconsiderate treatment of a patient. The notice did, however, set forth the two previous solicitations of Blake, which have been described.

The disciplining and firing of Blake resulted in the Service Employees International Union, Local 105, filing complaints which were served on the hospital on January 15, 1976, and on March 9, 1976. The two complaints

were consolidated and were issued on April 20, 1976, alleging that the hospital had violated § 8 (a) (1) and (3) of the National Labor Relations Act. The cause was tried before an administrative law judge, Earldean V. S. Robbins.

II.

The issues heard before the administrative law judge were whether the respondent hospital:

a. Had promulgated an illegal no-solicitation and no-distribution rule.

b. Had disparately applied and enforced illegal no-solicitation rules.

c. Had engaged in unlawful surveillance of an employee's protected activity.

d. Had discharged Blake because of his activities on behalf of the union.

III.

The opinion of the administrative law judge, which was adopted in its entirety by the Board, condemned both the original and revised no-solicitation rules of National Jewish Hospital. The original of these, it held, was invalid because it required prior permission for any solicitation. The revised one, which prohibited employee solicitation during nonworking hours in working areas other than patient care areas, was ruled to be a violation of § 8 (a) (1) of the Act. The hospital was also found to have violated the Act (§ 8 (a) (1)) by issuing a written warning to employee organizer Blake for his first infraction of the invalid no-solicitation rule and by the oral reprimand for a second such violation and by engaging in surveillance of Blake's activities in the cafeteria.

The administrative law judge further found that Blake's discharge violated § 8 (a) (1) and (3), 29 U. S. C. § 158 (a) (1), (3) (1970). Respondent was ordered to cease and desist prohibiting its employees from soliciting on behalf of any labor organization on the premises other than in immediate patient care areas during nonworking time or in other ways interfering with employees' rights under the National Labor Relations Act.

The judge also ordered that Blake be reinstated with back pay, with his records expunged of the two unlawful warnings and reprimands, and that a notice be posted. The Board affirmed the decision with only minor modifications.

The legal background for this decision must be considered briefly. Both the administrative law judge and the Board, in reaching the decision which we are reviewing, were following the Board's decision in St. John's Hospital and School of Nursing, Inc., 222 NLRB 182. Subsequent to the issuance of the Board's decision in the case before us, this court had before it an enforcement proceeding in St. John's Hospital & School of Nursing, Inc. v. NLRB, 557 F. 2d 1368 (1977). A panel of this court denied enforcement of the Board's order in a substantial respect. The Board had ruled that employees should have access for solicitation purposes to all areas of the hospital except strict patient care areas. This court, however, determined that insofar as the Board's order permitted solicitation in areas of the hospital to which patients had access, it was not entitled to be enforced. *See* St. John's Hospital & School of Nursing, Inc. v. NLRB, *supra*. The reasoning was that the hospital's interest in having a tranquil atmosphere for

patients required that it be free to prohibit solicitation not only in strict patient care areas but, in addition, in areas accessible to patients such as hallways, stairs, elevators, waiting rooms and public cafeterias and gift shops. The sweep of the order was such as to preclude solicitation except in employee-only lunchrooms and cafeterias, locker rooms, restrooms and parking areas.

IV.

At about the time that this court rendered its decision in *St. John's Hospital,* the First Circuit reached a contrary result in NLRB v. Beth Israel Hospital, 554 F. 2d 477 (1st Cir. 1977), *aff'd.* 98 S. Ct. 2463 (1978). Its holding was that a no-solicitation rule in areas accessible to patients was illegal and was not to be enforced in a cafeteria and coffee shop, notwithstanding that some patients patronized these places. The hospital's rule there was not unlike the one in the instant case in the respect that it limited solicitation to locker rooms and certain restrooms. *Id.* at 479 n. 1.

On June 22, 1978, the Supreme Court affirmed in all aspects the decision of the First Circuit in *Beth Israel, supra.* It agreed with the First Circuit that the Board's order was entitled to be fully enforced.

The Supreme Court spoke with approval of the Board's conclusion that the strict rules against solicitation applied only to patients' rooms, operating rooms and places where patients received treatment, such as X-ray and therapy rooms. On this the Court said:

> The Board concluded that prohibiting solicitation in such situations was justified and required striking the balance against employees' interests in organizational activity. The Board determined, however, that the balance should be struck against the prohibition in areas other than immediate patient care areas such as lounges and cafeterias absent a showing that disruption to patient care would necessarily result if solicitation and distribution were permitted in those areas. The Board concluded, on a record devoid of evidence which contradicted that assessment, that the possibility of disruption to patient care in those areas must be deemed remote.

98 S. Ct. at 2471.

The opinion of the Supreme Court, like the case at bar, deals with the issue whether union solicitation activity can be prohibited by the hospital in the hospital cafeteria and coffee shop which is accessible to patients and the public. *Id.* at 2477. The Court said that in determining whether solicitation is permissible for areas accessible to patients, the National Labor Relations Board must balance the relative strengths of the competing interests which are, on the one side, the likelihood of disruption of patient care, as opposed to the extent of the interference with union organizational activities. *Id.* at 2475-76. The Court termed the cafeteria in *Beth Israel* as being a natural gathering area for employees, one in which the risk of harm to patients is relatively low as compared to potential alternative locations within the facilities. The Court regarded the evaluations of the Labor Board in that case as valid since it had considered all of the competing interests. The Supreme Court also said in passing that the restrictions imposed by the hospital, which effectively prevented union solicitation of the employees and meaningful discussions by them, constituted an unfair labor practice, because when union organiza-

tion activities are restricted to an area of the hospital which is not even accessible to all of the employees, there is an effective deprivation of ability to pursue union activities. *Id.* at 2468. Such unreasonable interference with employee solicitation, absent special circumstances, is presumptively an unfair labor practice. *Id.* at 2470. The Court noted that in *Beth Israel* (as in the present case) solicitation was allowed only in locker rooms and the adjacent restrooms. *Id.* at 2468.

It was noted by the Supreme Court that the Board had recognized that a hospital may be warranted in prohibiting solicitation even on nonworking time, in strict patient care areas, having in mind that solicitation could affect the patients. It was said that areas where this could happen would include the patients' rooms, operating rooms and patient treatment areas like x-ray and therapy. *Id.* At the same time the Court, however, rejected the notion that the possibility of disruption to patients required a prohibition on solicitation in any area accessible to a patient. *Id.* at 2477. To so hold excludes all sections of the hospital from solicitation. A patient could have access to the entire hospital. The Court agreed with the Board that the possibility of disruption to patient care from solicitation in cafeterias was remote. *Id.* at 2471. The hospital, it said, failed to introduce any evidence of harm to patients caused by solicitation in the cafeteria, notwithstanding that it had better access to such information than the Board had. *Id.* at 2474. Also, the hospital had allowed charitable drives to be conducted in the cafeteria in the past and this was without disruption of patient care. *Id.*[1] The Court concluded that the Board was free to draw rational inferences from the evidence that the possibility of disruption from union solicitation was remote. *Id.* at 2470. The Board was not required to prove that patient care would not be disrupted by such solicitation. *Id.* at 2472.

The protection of tranquility for the patients has appeal. Nevertheless, outside the strict patient care areas the Supreme Court considered the possibility of disruption too remote. It held that

> . . . the Board's general approach of requiring health-care facilities to permit employee solicitation and distribution during nonworking time in nonworking areas, where the facility has not justified the prohibitions as necessary to avoid disruption of health-care operations or disturbance of patients, is consistent with the Act.

Id. at 2477.

The majority opinion in *Beth Israel* considered the issue of cafeteria solicitation as part and parcel of the broader question of to what extent there can be employee discussion of union membership in areas of the hospital which are not exclusively devoted to patient care. Thus its opinion was that solicitation could be carried on in all areas of the hospital except those which were devoted to patient care (like patients' rooms, x-ray rooms, therapy areas, etc.). The fact that patients had access to areas was not considered important, because in a hospital like National Jewish the patients find their way to all parts

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1 It would ordinarily be anticipated or expected that a fund-raising activity might be more disruptive than labor organization solicitation.

of the hospital buildings. The opinion left open the possibility that the hospital could show the presence of special circumstances to establish that patient care was affected by solicitation and that actual patient disruption resulted from it. The mere possibility, however, of disturbance was held to be insufficient to justify promulgation of a regulation imposing unrelated restrictions.

In the *Beth Israel* case the numbers of patients who patronized the cafeteria were relatively small. This, however, was not anything like a turning point in the Court's opinion. Matters of substance were considered such as the necessity for the employees to have a place on the premises to exercise thir solicitation rights in accordance with the Supreme Court's decision in Republic Aviation Corp. v. NLRB, 324 U. S. 793 (1945). Also, the Supreme Court approved the Board's findings and orders together with the decision of the First Circuit, which ordered enforcement.

The record before us provides no factual basis for a conclusion that the patients at National Jewish Hospital suffered upset or experienced disruption of tranquility as a result of union solicitation in the cafeteria or in other places. In this connection we must be mindful that the Supreme Court in *Beth Israel* made it plain that the burden was on the employer to bring forward positive evidence showing that solicitation activities had a disrupting effect upon patients' health. In the dearth of such evidence, it becomes impossible to upset the findings of the Board and, therefore, there is no alternative except to enforce the Board's order. To accept the notion that the union solicitation per se pollutes the atmosphere would be out of harmony with the Supreme Court's ruling on

burden of proof. Therefore, the view that the mere presence of patients in various places in the hospital of itself prevents union solicitation in those places must also be rejected. To so rule would not only be unsupported by evidence, it would also, due to the ambulatory condition of the patients, render the entire hospital off limits to solicitation.

This is our reasoning in rejecting the arguments that inferences are to be drawn from the fact that the patients are ambulatory and the fact that they tend to be nervous because of being asthmatic.

As to the cafeteria, we are mindful that it, in the past, has been divided, whereby employees are directed to one side and patients to the other. This does allow patients to have some latitude if they do not wish to associate with employees. In other words, we do not say that the patients must associate with employees.

Finally, we consider the total impact of the *Beth Israel* decision. It is perhaps unnecessary to say that we consider that its thrust is strong in relationship to the case at bar; that it is not only applicable but controlling; that it comes to grips with our problem and resolves it.

It is our conclusion that the rulings and orders of the Labor Board are in accordance with the *Beth Israel* case, and it is hereby ordered that these rulings and orders are to be enforced.

No. 77-1061—NATIONAL LABOR RELATIONS BOARD V. NATIONAL JEWISH HOSPITAL AND RESEARCH CENTER

STANLEY, Senior District Judge, dissenting.

I respectfully dissent.

My concurrence in the panel's opinion filed July 28, 1978 was based—I now think incorrectly—on my belief that the decision of the Supreme Court in *Beth Israel Hospital v. NLRB*, — U. S. —, 98 S. Ct. 2463 (decided July 22, 1978), compelled enforcement of the Board's order.

As noted by the majority the opinion of the Supreme Court in *Beth Israel* deals, like the case at bar, with the issue whether union solicitation activity can be prohibited by a hospital in a hospital cafeteria and coffee shop which is accessible to patients and the public as well as to the employees.

This case originated with the discharge of Richard Blake, an employee of the hospital and an organizer for a union. The prinicipal reason given for his termination was "inconsiderate treatment of a patient" (Meyer Sharlin) while Blake was treating him. The Board found "some merit in respondent's argument that in view of Blake's failure to give his account of what occurred, the Blake-Sharlin incident as reported by Sharlin would constitute ample justification for Blake's discharge. The issue, however, is not whether the incident would constitute such justification but whether, in fact, Blake's discharge was motivated solely by this incident, or whether it was motivated in whole, or in part, by Blake's union activities" and "that Blake's discharge was motivated, at least in part, by his violation of the no solicitation rules". It is clear that the Board's decision was based on its conclusion that the hospital's rule, insofar as it banned solicitation in the cafeteria and coffee shop, was invalid, and that his discharge violated Section 8 (a) (1) and (2) of the National Labor Relations Act.

The majority holds that the decision of the Supreme Court in *Beth Israel* considers and resolves all of the issues posed in this case and concludes that it is fully applicable and controlling. I cannot agree. The function of the Board, according to *Beth Israel,* is to balance conflicting legitimate interests to effectuate fundamental national labor policy. In cases affecting the health care industry the conflicting interests are, on the one hand, the hospital's desire to protect its patients from disturbance and, on the other, the union's desire to organize the hospital's employees. As noted by Mr. Justice Brennan "it may be [in the health care field] that the importance of the employer's interest here demands use of a more finely calibrated scale." The Board itself has concluded that the special characteristics of hospitals justify a rule different from that which the Board generally applies to other employers. *St. John's Hospital v. School of Nursing, Inc.,* 222 NLRB 1150 (1976).

On the basis of the record before the Board in *Beth Israel* the Supreme Court held that the Board had correctly evaluated the relative strengths of the competing interests and considered all factors appropriately to be taken into account. The record in *Beth Israel* differs in each material area from the record before the Board in the case at bar.

In *Beth Israel* the hospital "was unable to introduce *any* evidence to show that solicitation or distribution [in the cafeteria] was or would be harmful." (Emphasis in the original.) The majority opinion in our case includes the statement

> The record before us provides no factional basis for a conclusion that the patients at National Jewish

> Hospital suffered upset or experienced disruption of tranquility as a result of union solicitation in the cafeteria or in other places.

I do not find support in the record for that observation. At the hearing before the Administrative Law Judge the uncontroverted evidence was that Jewish Hospital differs notably from a general hospital; that its patients may remain in the hospital six to nine months or longer; that 90 to 95 percent of the patients are ambulatory and take their meals in the cafeteria; that medical care is provided to asthmatic patients who have been unable to cope with this condition on an outpatient basis; that asthma is considered a psychophysiological disorder "which has an organic, biological medical basis complicated by emotional factors such as stress, anxiety, anger and tension. The extent to which an asthmatic can cope with these emotions can be a determining factor in how well he manages his asthma." Despite this evidence—undisputed—the Board, although recognizing that the hospital's basic function is patient care, concluded that the rule prohibiting solicitation in the cafeteria patronized by 95 percent of the patients was not necessary to avoid disruption of that function.

In *Beth Israel* a patient was allowed to visit the cafeteria only when his doctor certified that he was well enough to do so and the Supreme Court deemed it "of critical significance that only 1.56 percent of the cafeteria patrons are patients." In the case at bar about 95 percent of the patients, including some receiving intravenous fluids and oxygen treatment, frequent the cafeteria.

In *Beth Israel* the Supreme Court held that consideration of the availability of alternate space where union activities were permitted was inapposite "where the only areas in which organizational rights are permitted is not conducive to their exercise". There only a fraction of 2200 regular employees had access to any of the areas (six separate and scattered locker rooms containing only 613 lockers) in which union solicitation was permitted. In the case at bar the approximately 650 employees of Jewish Hospital had access to four lounges and two locker rooms where solicitation was permitted.

I believe that in this case the Board, on the record before it, failed utterly to take into account the unique character of Jewish Hospital or the effect of stress upon the patients. I believe also that the Board's decision, insofar as it deals with solicitation in the hospital cafeteria, is not rational; is not supported by the evidence, or for that matter by the findings of the Administrative Law Judge adopted by the Board; and that the Board's own standards as announced in *St. John's Hospital* were misapplied.

I would deny enforcement of those parts of the Board's order requiring the respondent to cease and desist from promulgating any rule prohibiting solicitation or the distribution of literature in the cafeteria and coffee shop; requiring the respondent to expunge from its records reports on the activities of Richard Blake; requiring the respondent to offer to Richard Blake reinstatement to his former job or an equivalent position; and requiring the respondent to make Richard Blake whole for his loss of earnings.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

A true copy
Teste

Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit

SEAL

By STEPHANIE SCHETROM
Deputy Clerk

No. 77-1061

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

NATIONAL JEWISH HOSPITAL AND
RESEARCH CENTER,

Respondent.

JUDGMENT

Before: DOYLE and LOGAN, Circuit Judges, and STANLEY, Senior District Judge.*

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for enforcement of a certain order issued by it against Respondent, National Jewish Hospital and Research Center, Denver, Colorado, its officers, agents, successors, and assigns, on December 1, 1976. The Court heard argument of respective counsel on May 12, 1978, and considered the briefs and transcript of record filed in this cause. On July 28, 1978, the Court, being fully advised in the premises, issued its decision granting enforcement of the Board's Order.

On August 29, 1978, Respondent filed a petition for rehearing, thereafter, on November 7, 1978, the Court denied the Respondent's petition for rehearing, withdrew its opinion filed July 28, 1978, and issued its new opinion November 2, 1978, granting enforcement of the Board's Order. In conformity therewith it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Tenth Circuit that the said Order of the National Labor Relations Board in said proceeding be enforced, and that the Respondent, National Jewish Hospital and Research Center, its officers, agents, successors, and assigns abide by and perform the directions of the Board contained in said order.

/s/ William E. Doyle
Judge, United States Court of
Appeals for the Tenth Circuit

Dated: November 28, 1978

*Of the District of Kansas, sitting by designation.

Supreme Court, U. S.
FILED
MAR 28 1979
MICHAEL RODAK, JR., CLERK

No. 78-1273

In the Supreme Court of the United States

OCTOBER TERM, 1978

NATIONAL JEWISH HOSPITAL AND RESEARCH CENTER, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1273

NATIONAL JEWISH HOSPITAL AND RESEARCH CENTER, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. The Board found that petitioner ("the Hospital") violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by promulgating and maintaining a rule that prohibited employee solicitation in any public area within the hospital premises (Pet. App. 33).[1] Following its decision in St. *John's Hospital and School of Nursing, Inc.*, 222 N.L.R.B. 1150 (1976), enforcement denied, 557 F. 2d 1368 (10th Cir. 1977)[2], the Board

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[1]The Board further found that the Hospital violated Section 8(a)(1) of the Act by issuing a written warning notice and oral reprimand to employee Richard Blake for soliciting in the cafeteria, contrary to the invalid rule, and Section 8(a)(3) and (1) by discharging Blake for engaging in union activities (Pet. App. 33).

[2]In *St. John's*, the Board held that, while a hospital may lawfully ban employee solicitation, even during non-working time, in immediate patient care areas such as patients' rooms, operating

concluded that the rule was overly broad since it encompassed public areas that were not devoted to patient care, such as the cafeteria, which was used by employees and patients (Pet. App. 14-15).[3] The Board rejected the Hospital's contention that, because most of its patients were ambulatory and suffered from conditions aggravated by stress and anxiety, it should be permitted, under the principles enunciated by the Board in *St. John's,* to ban employee solicitation in all areas to which patients have access. Instead, the Administrative Law Judge, whose findings were adopted by the Board, found that the Hospital's practices did not bear out its claim that, in those areas of the Hospital where patients mingle with other patients and the visiting public without prohibition, employee solicitation would interfere with patient care. "The record indicates that solicitations are permitted for United Way and United Jewish Appeal, the patients herein converse, and indeed express differences of opinion in these social settings without general restriction as to subject matter. There is no evidence that employees are restricted from discussing whatever they wish in the cafeteria, except union solicitation." (Pet. App. 16-17).[4]

2. The court of appeals (Senior District Judge Stanley dissenting) upheld the Board's decision and enforced its remedial order. The court found this Court's decision in *Beth Israel Hospital* v. *National Labor Relations Board,*

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rooms, and places where patients receive treatment, a ban on that activity in other areas to which patients and visitors have access is invalid, absent a showing by the hospital that such a ban is necessary to avoid disruption of patient care.

[3]The effect of the rule was to confine employee solicitation to the employee locker rooms and lounges (Pet. App. 18).

[4]The court also noted that the cafeteria "in the past, has been divided, whereby employees are directed to one side and patients to the other. This does allow patients to have some latitude if they do not wish to associate with employees" (Pet. App. 57).

437 U.S. 483 (1978), to be "controlling" (Pet. App. 57). The court stated (*id.* at 56-57):

> The record before us provides no factual basis for a conclusion that the patients at National Jewish Hospital suffered upset or experienced disruption of tranquility as a result of union solicitation in the cafeteria or in other places. In this connection we must be mindful that the Supreme Court in *Beth Israel* made it plain that the burden was on the employer to bring forward positive evidence showing that solicitation activities had a disrupting effect upon patients' health. In the dearth of such evidence, it becomes impossible to upset the findings of the Board and, therefore, there is no alternative except to enforce the Board's order. To accept the notion that the union solicitation per se pollutes the atmosphere would be out of harmony with the Supreme Court's ruling on burden of proof. Therefore, the view that the mere presence of patients in various places in the hospital of itself prevents union solicitation in those places must also be rejected. To so rule would not only be unsupported by evidence, it would also, due to the ambulatory condition of the patients, render the entire hospital off limits to solicitation.

3. In *Beth Israel, supra,* the Court held that a ban on employee solicitation in that hospital's cafeteria, which was used primarily by employees but also by patients and visitors, violated Section 8(a)(1) of the Act since the hospital had not sustained its burden of showing that such a ban was necessary to avoid a disruption of patient care. The basic questions presented here are whether the principles of the *Beth Israel* decision are applicable (1) to a hospital cafeteria where the patient usage is greater than it was in *Beth Israel* and (2) to other public areas of

the hospital to which patients have access.[5] The same basic questions are presented in *National Labor Relations Board* v. *Baptist Hospital, Inc.*, No. 78-223, cert. granted January 8, 1979, and it is likely that the Court's decision in that case will provide guidance as to the proper resolution of this case.[6] Accordingly, consideration of this petition should be deferred pending this Court's decision in *Baptist Hospital.*

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JOHN S. IRVING
General Counsel
National Labor Relations Board

MARCH 1979

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[5]Petitioner misconstrues the opinion of the court below in contending that the court would require the Hospital "to permit solicitation until it could collect enough incidents to bring forth 'positive evidence' that solicitation had actually caused injury to patients" (Pet. 9). The opinion as a whole makes plain that the court was not requiring the Hospital to show that solicitation had actually resulted in harm to patients, but merely to adduce evidence from which it could reasonably be concluded that solicitation in particular areas of the Hospital would be likely to interfere with patient care.

[6]We are sending petitioner a copy of our brief in No. 78-223.

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1273

NATIONAL JEWISH HOSPITAL AND RESEARCH CENTER,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF THE AMERICAN HOSPITAL ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

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No.

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BRIEF AMICUS CURIAE ON BEHALF OF THE AMERICAN HOSPITAL ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

INTEREST OF THE AMICUS CURIAE.[1]

The American Hospital Association (hereafter "AHA")[2] files this brief *Amicus Curiae* to present its views in a case of great importance in the application of the National Labor Relations Act to the health care industry.[3] The issue presented in this case

1. This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 42(1).

2. The AHA is a non-profit Association of more than 6,500 member institutions engaged in the delivery of health care. It is the largest Association of health care institutions of its kind in the United States.

3. In 1974, Congress enacted Public Law 93-360 (S. 3203) which amended the Taft-Hartley Act to bring voluntary non-profit health care institutions under the federal law.

concerns the burden of proof required of a hospital to justify its regulation of employee solicitation and distribution activity which potentially affects the health and well-being of the hospital's patients, their relatives, visitors and the public.

In 1976, the National Labor Relations Board (hereinafter "the Board") acknowledged that its traditional policies regarding industrial and manufacturing employers' rules regulating employee solicitation and distribution activity are inappropriate for the health care industry. ***St. John's Hospital and School of Nursing, Inc.***, 222 NLRB 1150 (1976).[4] The Board ruled that "special considerations" of the purpose and function of health care institutions justified an expanded prohibition on employee solicitation and distribution activities; but the Board would only permit employer regulation of employee activities in "immediate patient care areas" of a hospital.[5]

The Tenth Circuit, upon review of the Board's *St. John's* decision, disagreed with the Board's ruling, and found that the Board's decision did not sufficiently protect the interests of the hospital, the patients who are served therein or the public who visit the hospital premises. The Tenth Circuit held that hospitals could regulate solicitation and distribution activities in all hospital areas to which patients and visitors have access.[6]

The Board, however, has continued to perpetuate its discredited "immediate patient care area" standard in several cases which have reached various Circuit Courts of Appeal.[7] The result has been predictable. There has emerged from the Courts of

4. See *St. John's Hospital & School of Nursing, Inc.* v. *NLRB, den. enf. in part*, 557 F. 2d 1368 (10th Cir., 1977).

5. *St. John's Hospital & School of Nursing, Inc., supra.*

6. *St. John's Hospital* v. *NLRB, supra.*

7. *Lutheran Hospital of Milwaukee* v. *NLRB*, 564 F. 2d 208 (7th Cir., 1977); *Baylor University Medical Center* v. *NLRB*, 578 F. 2d 351 (D. C. Cir. 1978); *NLRB* v. *Baptist Hospital, Inc.*, 576 F. 2d 107 (6th Cir., 1978); *NLRB* v. *National Jewish Hospital and Research Center, Inc.*, No. 77-1061, ... F. 2d ..... (10th Cir., 1978).

Appeals several conflicting decisions as to where and under what circumstances hospitals may lawfully restrict employee activities. This poses a continuing dilemma for hospitals seeking to fashion rules regulating employee solicitation activity for the purpose of furthering their patient care responsibilities.

On June 22, 1978, this Court decided *Beth Israel Hospital* v. *NLRB*[8]—the first case involving an interpretation of a hospital's solicitation-distribution rule. This Court ruled that Beth Israel's solicitation/distribution rule was overly broad because the infrequency of patient and visitor use of the cafeteria and coffee shop did not warrant the restriction on employee Section 7 rights. Following *Beth Israel*, this Court decided *Lutheran Hospital of Milwaukee, Inc.* v. *NLRB*,[9] and *NLRB* v. *Baylor University Medical Center*.[10] In those cases, it became clear that the Court intended its *Beth Israel* decision to be limited to its own particular factual circumstances where patients and visitors seldom used the cafeteria.

On July 28, 1978, the Tenth Circuit issued its first opinion in the instant case, citing *Beth Israel* to support its enforcement of the Board's determination that the solicitation and distribution rule at National Jewish Hospital was overly broad.[11] On Petition for Rehearing *en banc*, the Hospital and AHA, as *amicus curiae*, argued that the Tenth Circuit should rehear the case as it (1) failed to consider the balancing tests set forth by this Court in its *Beth Israel* decision, (2) failed to consider the effect of this Court's decision in *Lutheran Hospital of Milwaukee, Inc.*, and (3) unreasonably failed to consent to a Board motion requesting a remand to the Board in light of the considerations raised by this Court in *Beth Israel*.

8. ..... U. S. ....., 46 U. S. L. W. 4764 (June 22, 1978).

9. *Lutheran Hospital of Milwaukee, Inc.* v. *NLRB*, ... U. S. ....., 46 U. S. L. W. 3787 (June 26, 1978).

10. *NLRB* v. *Baylor University Medical Center*, ... U. S. ....., 47 U. S. L. W. 3203 (October 30, 1978).

11. *NLRB* v. *National Jewish Hospital and Research Center, Inc.*, No. 76-1061 (July 28, 1978).

The Tenth Circuit, in response to the Petition For Rehearing *en banc*, withdrew its July 28 opinion and on November 2, 1978, substituted a new opinion,[12] based on a different rationale, but affirmed its earlier decision. This new decision acknowledged the significant factual distinctions between the operation of National Jewish Hospital and Beth Israel Hospital. However, the court ruled that National Jewish Hospital had failed to meet the burden of proof required by this Court in its *Beth Israel* decision when it failed to produce "positive evidence showing that solicitation activities had a disrupting effect on patient's health."[13]

The impact of requiring a hospital to show an adverse effect upon a patient's health is, we submit, contrary to what this Court intended in its *Beth Israel* decision. Perpetuation of such an outrageous standard requiring hospitals to subject their patients to unjustifiable risks of physical or emotional harm in order to prove actual patient suffering jeopardizes our country's health care delivery system. It is ironic that justification for having a rule to protect patient health and well-being would require a hospital to prove that without such a rule patients suffer. The AHA urges this Court to grant the Petition for Writ of Certiorari in order to consider the serious problems raised by the Tenth Circuit decision.

REASONS FOR GRANTING THE WRIT.

I. The Tenth Circuit's Decision Is in Direct Conflict with the Intent of the Supreme Court's Beth Israel Decision as Well as Established Board Policy.

Judge Doyle, writing for the Tenth Circuit, stated in his opinion in *National Jewish:*

12. *NLRB* v. *National Jewish Hospital and Research Center*, No. 77-1061 (November 2, 1978).

13. *Id.* at slip op. 10.

> "[W]e must be mindful that the Supreme Court in *Beth Israel* made it plain *that the burden was on the employer to bring forward positive evidence showing that solicitation activities had disrupting influence upon patient's health.* In the dearth of such evidence, it becomes impossible to upset the finding of the Board, and, therefore, there is no alternative except to enforce the Board's order." (emphasis supplied)[14]

In commenting further on what constituted "positive evidence" Judge Doyle noted:

> "The record before us provides *no factual basis for a conclusion that the patients at National Jewish Hospital suffered upset or experienced disruption of tranquility as a result of union solicitation* in the cafeteria or in other places." (emphasis supplied)[15]

In reaching his conclusion that the Board's order should be enforced, Judge Doyle rejected the Hospital's expert medical testimony that the exposure of patients to employee solicitation and distribution activities could well trigger adverse reactions to patient health and recovery. Contrary to Judge Doyle's finding of a "dearth of evidence",[16] the Hospital introduced into evidence substantial medical testimony concerning the operation of National Jewish Hospital as well as a profile of the medical conditions treated at the facility.[17]

National Jewish Hospital and Research Center specializes in the treatment of asthmatic patients who cannot manage to control their physical condition on an outpatient basis. The average length of stay of patients is nine months or longer.[18] The primary factor in the total therapeutic treatment program for patients at National Jewish is the elimination of personal stress and anxieties in patients as well as isolation from situations

14. *NLRB* v. *National Jewish Hospital, supra,* at slip op. 10.
15. *Id.* at 10.
16. *Id.* at 10.
17. See Transcript at 63, 68, 73 and 130.
18. Transcript at 59.

that may cause stress and anxiety for patients.[19] Over ninety percent of the patients are ambulatory and are involved in treatment as a part of their daily program in virtually all areas of the facility.[20] Approximately ninety-five percent of the patients take their meals in the cafeteria (including receiving treatment in the cafeteria via intravenous fluids or medicine and patients who receive oxygen).[21]

The facts outlined above were presented in testimony by both the hospital administrator of National Jewish Hospital and an attending physician specializing in the care of asthmatic patients. Uncontroverted testimony of the effect of stress, anxiety, anger and tension on the asthmatic condition was also presented.[22]

Despite this significant evidence, the court concluded that National Jewish Hospital failed to meet its burden of showing positive evidence of upset patients or disruption occasioned by employee solicitation and distribution activities.[23] This burden of showing actual harm to patients' health, the Tenth Circuit declared, is required by this Court's *Beth Israel* decision.[24]

The American Hospital Association asserts that this interpretation of *Beth Israel* is patently erroneous and should therefore be reversed.

Nowhere in *Beth Israel* does this Court require an employer to produce evidence of actual harm to patients in order to justify a prohibition of employee solicitation and distribution activity in *any* area of a hospital. To the contrary, this Court took great care to point out the serious consequences of adversely affecting a hospital's provision of health care to patients.[25] While the Supreme Court upheld the right of the Board to insure that

19. Transcript at 64, 67, 68, 75.
20. Transcript at 61.
21. Transcript at 130, 66.
22. Transcript at 60, 63, 64, 67, 68 and 75.
23. *NLRB* v. *National Jewish Hospital, supra* at 10.
24. *Id.* at 10.
25. *Beth Israel Hospital* v. *NLRB, supra* at 46 U. S. L. W. 4769.

hospital regulations did not unjustifiably interfere with employees' Section 7 rights, the Court did not revise the Board's prior policy that the employer's burden was one of demonstrating a *likely* interference with disruption to patient care. The *Beth Israel* court certainly did not require that a hospital prove actual harm to a patient's health.[26]

The Court based its ruling in *Beth Israel* upon the evidence which showed the relatively infrequent usage of the cafeteria by patients and their visitors when compared to the widespread employee usage of these same facilities. The court stated that patients are less likely to be subjected to potentially unsettling activities when they do not frequent certain areas of a hospital. Consequently, the Court concluded that it was unreasonable to allow the Hospital to restrict employee solicitation and distribution activity in those areas and upheld the Board's enforcement order on that basis.[27]

The Court never reached the issue of the standard of the severity of impact on patient care (potential v. actual harm to patient) necessary to sustain an employer's regulation of employee solicitation and distribution activity. Consequently, *Beth Israel* left undisturbed the prior Board standard of threatened harm to patient care.

In addressing this issue in the hospital context, the Board has found:

> "[I]t must be recalled that Respondent's facility is not a manufacturing plant, it is a hospital . . . Further, the hospital services ill individuals who, in their weakened condition, may readily be upset if they overhear antiunion—prounion arguments among employees while they (the patients) are in their rooms or in the halls or elevators. And *a hospital need not wait until an untoward incident*

26. *Id.*

27. In contrast this Court, in *NLRB* v. *Baylor University Medical Center, supra,* upheld the D. C. Circuit's determination that the Hospital could restrict employee solicitation and distribution activities in hospital corridors, *without* the necessity of a positive showing of actual harm to patients when it was shown that patients frequently utilized the corridors.

> *actually takes place before undertaking reasonable measures to anticipate and forestall such an occurrence.*" (emphasis supplied)[28]

The Board, in *St. John's Hospital and School of Nursing, supra,* reaffirmed this basic recognition of the special circumstances in hospitals justifying solicitation and distribution restrictions as follows:

> "We recognize that the primary function of a hospital is patient care and that a tranquil atmosphere is essential to carry out that function." *Ibid.;* "All parties further agree that the special circumstances surrounding employment in a hospital setting justify some additional restrictions on employee solicitation and distribution to maintain the tranquil atmosphere essential to the hospital's primary function of providing quality patient care." *St. John's Hospital* v. *NLRB,* 557 F. 2d 1368, 95 LRRM 3058, 3060 (10th Cir., 1977).

In industrial and retail establishments the Board has permitted employers to develop and maintain broad no solicitation/no distribution rules, based only upon notions of "conceivable" *May Department Stores,*[29] "potential" *McDonald's Corp.,*[30] or "possible" *Banker's Club, Inc.,*[31] harm to the customer-employer relationship. Surely, the Tenth Circuit's more severe standard which it would apply to hospitals is unreasonable in view of the real threat which employee activity poses to patient well-being.

The clear implication of the Tenth Circuit's rejection of the Hospital's evidence of expert medical testimony (concerning the potential risk of harm to patients occasioned by employee solicitation and distribution activity), is that only evidence of

28. *Guyan Valley Hospital, Inc.,* 198 NLRB 147 (1972).

29. 59 NLRB 976 (1944), *enf'd* 154 F. 2d 533 (8th Cir., 1945), *cert. den.* 329 U. S. 725 (1946).

30. 205 NLRB 404 (1973).

31. 218 NLRB No. 7 (1975).

actual harm to a patient will suffice to meet the Hospital's burden of proof. AHA asserts that this burden of proof standard is incompatible with the Supreme Court's decisions in *Beth Israel* and the Board's own policy in *Guyan Valley* and *St. John's.*

II. The Tenth Circuit's Requirement of a Showing of Actual Harm Is Injurious to the Purpose of Health Care Institutions in Delivering Care and Insuring the Welfare of Its Patients.

The burden placed by the Tenth Circuit upon hospitals to prove the justification for their no solicitation/no distribution rules through evidence of actual patient harm, requires hospitals to repudiate the very purpose for their existence—the care and well-being of their patients. Under the Tenth Circuit standard, a hospital, like National Jewish Hospital, would be required to demonstrate that a patient suffers actual harm (e.g., asthmatic attack or worse) as a means of justifying its employee solicitation and distribution prohibitions. The implications of this requirement are horrifying.

Under the Tenth Circuit standard, each hospital solicitation and distribution rule would be subject to question until a patient became upset or ill when confronted by employee solicitation or distribution activity. Only upon the occurrence of a patient's suffering, would an institution thereafter be justified in having a no solicitation/no distribution rule regulating employee activity in certain areas of its facility. Not only would a hospital's burden be to show harm to a patient, but it would be required under this standard to prove also that the physical injury to a patient was proximately caused by employee solicitation and distribution activity.

Under this standard, there would be not only the suffering of a patient incurring such harm, but also the real potential for a malpractice suit against the hospital for failing to adequately control its staff and allowing such activity to be the cause-in-fact

of a patient's injury. Such liability, as, for example, in the case of National Jewish Hospital, could be attributed to the hospital. The expert medical testimony developed in the instant case demonstrates knowledge that asthmatic patients are particularly susceptible to physical harm when confronted with controversial, heated or stressful situations such as occur during union solicitations.

Thus, the Tenth Circuit, by rejecting the import of the unrebutted testimony of expert medical and hospital witnesses, has unwittingly subjected National Jewish's patients to unjustifiable risks of harm, as well as subjecting the hospital to potential risks of personal injury liability.

CONCLUSION.

Should this Court presume that *National Jewish* represents an isolated misapplication of *Beth Israel*, AHA wishes to point out that at least one administrative law judge has already cited the Tenth Circuit's *National Jewish* opinion in support of another equally unsettling health care industry solicitation/distribution case.[32] There is every likelihood that additional Board decisions will embrace this *National Jewish* standard.

AHA asserts that the Tenth Circuit's decision in this case places its several thousand members in a position of jeopardy in attempting to deal with the effects of employee solicitation and distribution activity. AHA believes that the Tenth Circuit's decision is untenable and erroneous in light of the realities of hospital operations today. Furthermore, AHA asserts that this Court must reverse the Circuit's decision in order to restore the proper balancing of interests set forth in its *Beth Israel* decision.

32. See *Yale New Haven Hospital and District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO*, Case No. 1-CA-14509 (1978).

For all of the above reasons, as well as for the reasons set forth by the Petitioner in its brief, AHA respectfully requests that this Court grant the Petition for Writ of Certiorari.

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1273

NATIONAL JEWISH HOSPITAL AND RESEARCH CENTER,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF AMICI CURIAE ON BEHALF OF THE KANSAS HOSPITAL ASSOCIATION, MISSOURI HOSPITAL ASSOCIATION, OKLAHOMA HOSPITAL ASSOCIATION, AND TULSA AREA HOSPITAL COUNCIL IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INTEREST OF AMICI

The *amici*, Kansas Hospital Association, Missouri Hospital Association, Oklahoma Hospital Association and Tulsa Area Hospital Council are nonprofit corporations, the combined membership of which is approximately 400 hospitals.[1] Many of the *amici's* member hospitals maintain no-solicitation rules governing employee conduct.

1. This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 42(1).

Like *NLRB* v. *Baptist Hospital, Inc.*, No. 78-223, *cert. granted*, ... U.S. ....., 47 U.S.L.W. 3463 (January 8, 1979), this case concerns the right of hospitals to regulate employee solicitation and distribution in areas of the hospital to which patients and visitors have access. The United States Court of Appeals for the Tenth Circuit, in *NLRB* v. *National Jewish Hospital and Research Center*, No. 77-1061, ... F.2d ..... (10th Cir. 1978), enforced the decision of the National Labor Relations Board that the hospital's no-solicitation rule was unlawful because it restricted solicitation on nonworking time in areas of the hospital other than immediate patient care areas. The Court of Appeals held that in order to justify its rule the hospital must prove that actual harm to patients or actual disruption of patient care had resulted from employee solicitation. It rejected expert medical testimony concerning the likelihood of harm to patients or the likelihood of disruption to patient care[2] as insufficient to meet the burden of proof that was articulated by this Court in *Beth Israel Hospital* v. *NLRB*, ... U.S. ....., 98 S. Ct. 2463 (1978).

If the *National Jewish* decision is permitted to stand, numerous of the member hospitals of the *amici* will be required to show actual harm or disruption of care before they can enact a broad prohibition on employee solicitation activity. Furthermore, if the Tenth Circuit's decision is followed by other Courts of Appeals, such a showing could be required for each of the more than 7,000 hospitals in the United States. The impact on patients of such a requirement would be disastrous, and such a result could not have been intended by this Court in *Beth Israel, supra.*

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2. Transcript at 59-68, 73, 75 and 130.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the decisions of other Courts of Appeals, and conflicts in principle with this Court's Beth Israel decision, as to the quantum of proof required to justify a broad no-soliciation rule.

The petition for a writ of certiorari should be granted because the decision of the Tenth Circuit conflicts with the decisions of the Sixth Circuit in *NLRB* v. *Baptist Hospital, Inc.*, 576 F.2d 107 (6th Cir. 1978), *cert. granted*, ... U.S. ....., 47 U.S.L.W. 3463 (Jan. 8, 1979), the District of Columbia Circuit in *Baylor University Medical Center* v. *NLRB*, 578 F.2d 351 (D.C. Cir. 1978), *cert. granted in part and denied in part*, ... U.S. ....., 47 U.S.L.W. 3298 (Oct. 30, 1978), *on remand*, ... F.2d ....., 100 LRRM 2340 (D.C. Cir. 1979), and conflicts in principle with this Court's decision in *Beth Israel, supra.*

In *Baptist Hospital, supra*, the Sixth Circuit concluded that the hospital had justified its prohibition on employee solicitation in areas to which patients and visitors had access because, "the record contains uncontradicted testimony that these areas are part of the total environment of the hospital where the medical needs of the patients are served by maintaining a climate free of strife and controversy . . . ." *Baptist Hospital, supra* at 110. Two members of the medical staff and the hospital administrator testified that solicitation "would have a *potential* for affecting patients and their families adversely . . . [and] any nonprofessional attitude among hospital employees is upsetting to patients . . . ." *Baptist Hospital, supra*, at 108-09 (emphasis added). They further testified that due to the present-day mobility of patients, there was no relevant

distinction between those areas of the hospital devoted to immediate patient care and other areas of the hospital to which patients and visitors have access. *Baptist Hospital, supra* at 109, 110. Both in *Baptist* and in this case, no evidence was introduced that contradicted in any way the testimony of the hospital's witnesses. *Baptist Hospital, supra* at 109; *National Jewish, supra* at slip. op. 13 (Stanley, J., dissenting).

In *Baylor, supra*, the D.C. Circuit denied enforcement to a decision of the National Labor Relations Board that had held unlawful a prohibition on solicitation in the corridors of the hospital. The Court of Appeals stated:

> [S]olicitation has a disruptive force quite apart from its contribution to noise level and overcrowding. There was evidence at the hearing that witnessing solicitation tends to undermine both patients' and visitors' confidence in the hospital. Having to confront the worry that employees might reduce their standards of service as part of a labor dispute seems an unnecessary and undesirable additional source of anxiety for persons already hard taxed emotionally. And the thought that matters affecting one's life and death are perceived in terms of wage increases and coffee breaks by those responsible for one's well-being fully justifies the very upsetting concern that patients and those close to them were shown to have about such activities. It is not only the *likelihood* that congestion and commotion would result from such solicitation, but also the *inherently disturbing effect* of interjecting undertones of labor disputes into a situation where sick persons are totally dependent on the unflagging assistance of others that are major factors contributing to the disruptive effect of solicitation. Wherever in the hospital an emotionally vulnerable group of patients and their visitors may be present, we feel that unique considerations come into play which justify an otherwise overly broad no-solicitation rule. *Baylor, supra* at 356 (emphasis added).

This Court granted certiorari to review that part of the *Baylor* decision that concerned solicitation in the cafeteria. Because the Court of Appeals had applied an incorrect legal standard, this Court remanded for reconsideration in light of *Beth Israel*. *NLRB* v. *Baylor University Medical Center*, ... U.S. ....., 47 U.S.L.W. 3298 (October 30, 1978).

On remand, the Court of Appeals stated:

> Beth Israel decidedly does not hold that a prohibition on solicitation in a cafeteria used by employees is unlawful. The lawfulness of the ban, instead, is determined on the evidence offered in each case; in Beth Israel, evidence that the cafeteria was a natural and well established gathering place for employees, rarely used by others, was regarded as dispositive. *Baylor University Medical Center* v. *NLRB*, ... F.2d ....., 100 LRRM 2340, 2343 (D.C. Cir. 1979).

The Court of Appeals further stated that "while Baylor's evidence may not justify a no-solicitation/no-distribution rule applicable to the entire operating schedule of the cafeteria . . . it does justify . . . a continuation of the ban during some periods." *Baylor University Medical Center* v. *NLRB, supra* at 2344. Therefore, the Court of Appeals again denied enforcement to the Board's order and remanded to the Board with leave to submit a new enforcement order.

Not only is the evidence presented by National Jewish stronger than that which the D.C. Circuit in *Baylor* found sufficient to justify a ban on solicitation, but also the

Tenth Circuit's interpretation of *Beth Israel* differs sharply from that of the D.C. Circuit.

The decision in *National Jewish*, therefore, clearly conflicts with the decisions of the D.C. Circuit and the Sixth Circuit. The Tenth Circuit, applying what it considered to be the law pursuant to this Court's decision in *Beth Israel, supra*, held that the hospital was required to show that patient care had actually been disrupted by employee solicitation, and refused to accord weight to medical testimony concerning the probability of harm and disruption if patients witnessed employees engaged in solicitation. The quantum of proof required by the Tenth Circuit to justify a broad no-solicitation rule is thus significantly different from that required by the Sixth Circuit or the D.C. Circuit.

Not only is there a conflict among the circuits, but there is also a conflict in principle with this Court's decision in *Beth Israel, supra*. In *Beth Israel*, the Court stated:

> We . . . hold that the Board's general approach of requiring health care facilities to permit employee solicitation and distribution during nonworking time in nonworking areas where the facility has not justified the prohibitions as necessary to avoid disruption of health care operations or disturbance of patients is consistent with the Act. *Beth Israel, supra* at 2477.

Assuming, for the sake of argument, that the Court in *Beth Israel* settled the burden of proof question, it did not, as the Tenth Circuit has erroneously concluded, settle the quantum of proof question. There is no indication in the Court's *Beth Israel* decision that the quantum of proof necessary to justify a broad prohibition on solicitation is that actual harm or disruption to patient care must be shown. On the contrary, throughout its decision in

Beth Israel, the Court refers to whether there is a "*likelihood* of disruption," whether there is a "*substantial threat* of harm," and whether "solicitation or distribution . . . *would be* harmful." *Beth Israel, supra* at 2473, 2474, and 2475 (emphasis added).[3]

The quantum of proof required by the Tenth Circuit is thus far greater than that which this Court implied in *Beth Israel*. Surely this Court did not intend to impose so great a burden upon the health care industry and to so jeopardize the patients it serves.

These conflicts justify the grant of certiorari to review the judgment below.

2. The decision below raises an important question of federal law which has not been, but should be, settled by this Court.

The fact that the Court has granted certiorari in *Baptist Hospital, supra*, attests to the importance of the question presented in this case. The validity of no-solicitation rules in hospitals has been, and will undoubtedly continue to be, an issue on which certiorari is sought unless the Court unequivocally disposes of the issue.

If this case is consolidated with the *Baptist Hospital* case, the Court will have the opportunity to fully address

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3. This approach is consistent with prior decisions of the National Labor Relations Board. In *Guyan Valley Hospital, Inc.*, 198 NLRB 107, 111 (1972), for example, the Board stated that "a hospital need not wait until an untoward incident actually takes place before undertaking reasonable measures to anticipate and forestall such an occurrence." *See also May Department Stores*, 59 NLRB 976 (1944), *enforced*, 154 F.2d 533 (8th Cir. 1945), *cert. denied*, 329 U.S. 725 (1946), in which the Board upheld a no-solicitation rule based upon "conceivable" harm; *McDonald's Corp.*, 205 NLRB 404 (1973), in which the Board upheld a rule based upon "potential" harm; and *Bankers Club, Inc.*, 218 NLRB 22 (1975), in which the Board upheld a rule based upon "possible" harm.

all aspects of the no-solicitation rule issue. The Court will thus be able to finally settle this important question of federal law that affects not only the more than 7,000 hospitals in the United States, but also the hundreds of thousands of patients whom they serve.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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